



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

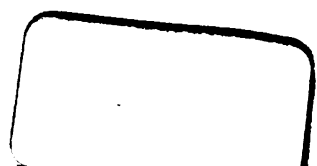
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

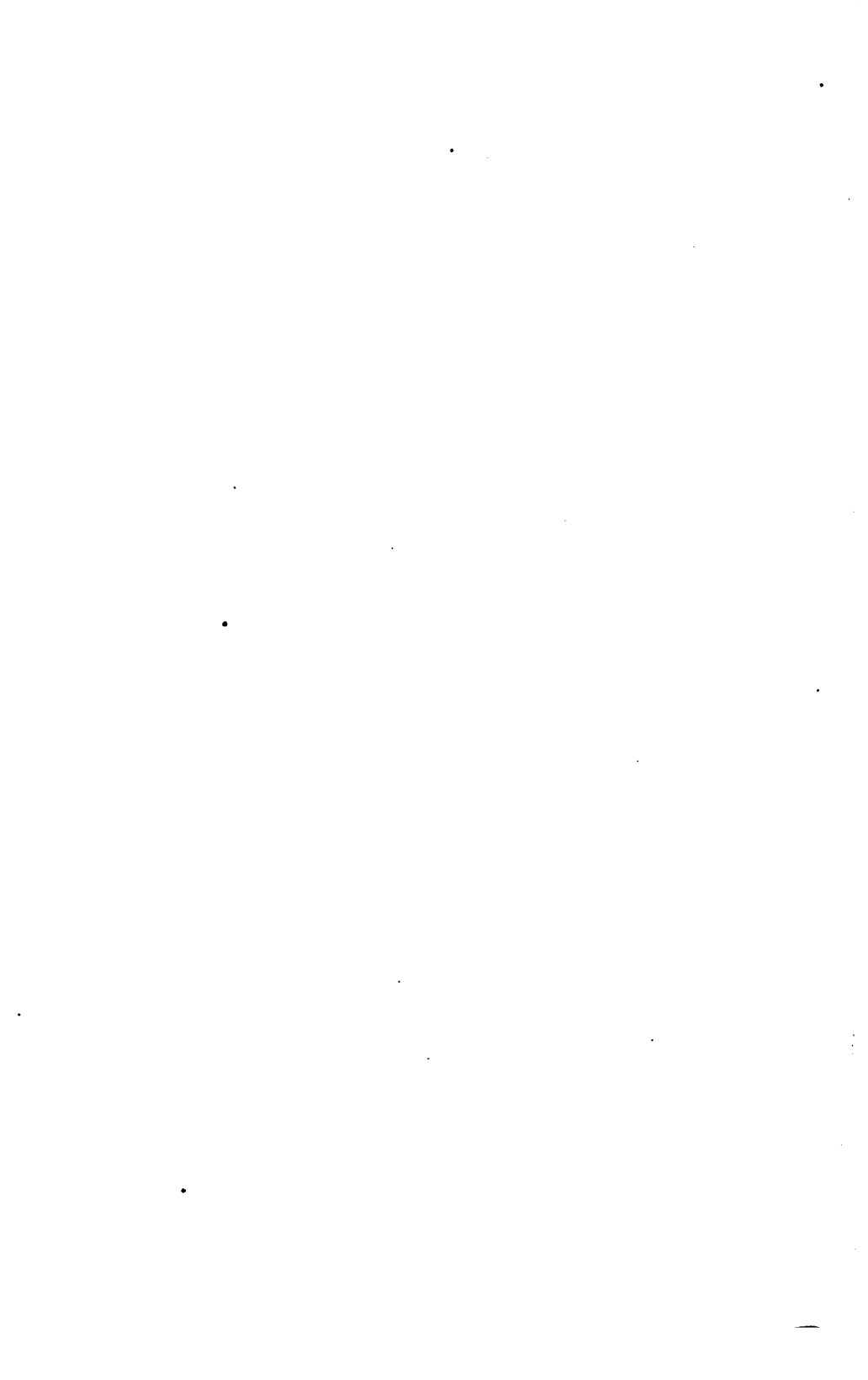
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



FN
AGX
LK_v
v.1



Hugo Grotius
HUGONIS GROTHII
DE JURE BELLI ET PACIS

LIBRI TRES

ACCOMPANIED BY AN ABRIDGED TRANSLATION

BY

WILLIAM WHEWELL D.D.

MASTER OF TRINITY COLLEGE

AND PROFESSOR OF MORAL PHILOSOPHY IN THE UNIVERSITY OF CAMBRIDGE:

WITH THE NOTES OF THE AUTHOR, BARBEYRAC, AND OTHERS.

VOLUME THE FIRST

Edited for the Syndics of the University Press



CAMBRIDGE:

M.DCCC.LIII.

JOHN W. PARKER, LONDON.

EDITOR'S PREFACE.

"IT is acknowledged by every one," says Mr Hallam, "that the publication of this treatise made an epoch in the philosophical, and we might almost say in the political history of Europe." This opinion of the importance of Grotius's work *De Jure Belli et Pacis*, prevailed from the time of its first appearance, and was exemplified by all the marks of honour with which such a book can be greeted. Numerous editions in various forms circulated rapidly: copious comments of several annotators, translations into several languages, speedily appeared; the work was published in the author's life-time, *cum notis variorum*, a distinction hitherto reserved to the ancient classics: and it was put into the *Index Expurgatorius* at Rome. Gustavus Adolphus carried it about with him and kept it under his pillow: Oxenstiern appointed its author the ambassador of Sweden at Paris: the Elector Palatine Charles Louis established at Heidelberg a Professorship of the science thus created; and the science has been promoted by the like means in many other places up to the present time.

Nor has it, at this day, ceased to be a book of the first-rate importance in this science. It is spoken of with respect and admiration by the principal modern writers on International Law: a knowledge of it is taken for granted in the discussions of questions belonging to that subject; and it is quoted among the cardinal authorities on such questions. And treating, as it does, of the fundamental points of Philosophical Ethics, as well as of their applica-

tion in the Laws of Nations, it has, in that department also, been always regarded as a primary work. It soon gave rise to Puffendorf's Treatise *On the Laws of Nature and Nations*, and to other books of the same kind; of which some, like our own Rutherford's *Course of Lectures on Grotius*, show the celebrity of the work, by taking from it nothing but the name. Mackintosh, in more than one place, gives to the work the highest terms of his eloquent praise; and how Mr Hallam speaks of it has been mentioned above.

Several objections have, however, been made to the work; and among them, one which I shall especially notice, since an attempt is made in the present edition to remedy the inconvenience thus complained of. It has been said that Grotius's composition is so encumbered, in almost every page, with a multitude of quotations from ancient historians, orators, philosophers and poets, as to confuse the subject, obscure the reasoning, and weary the reader. I am not at all disposed to dissent from what several eminent men have said in answer to this; defending Grotius's quotations, as evidences of men's moral judgments, as appeals to general sympathy, and as graceful literary ornaments; but I am also ready to allow that these citations go to the extent of disturbing the didactic clearness and convenient brevity which we wish to find in a philosophical work. Hence, in the translation with which I have accompanied the text, I have omitted all the quotations except those which were necessary to carry on the argument. By this means, the bulk of the work has been reduced more than one half; while, the names of the authors quoted, being retained in the translation, the reader can, if he chooses, pass to the passages adduced, which he will find on the same page. The translation is thus rather a selective than an abridged translation; for the didactic and argumentative parts are, in general, so

far from being here abridged, that explanatory expressions and clauses are introduced in a great number of passages where they seemed likely to make the meaning clearer.

It appears to me that the scheme and reasoning of Grotius's work are well worthy of being thus carefully presented to the reader. I agree with a former editor, Barbeyrac, that Grotius's learning, wonderful as it was, was far from being the greatest of his qualifications for the task which he undertook. His work is characterized throughout by solid philosophical principles consistently applied; by clear and orderly distinction of parts; by definite and exact notions, improved by the intellectual discipline of legal studies; by a pure and humane morality, always inclining to the higher side in disputed questions; and by a pervading though temperate spirit of religion. It may be doubted whether, even yet, we can place philosophical morality on any better basis than that which he lays down in his *Prolegomena*; namely, the social impulse by which man is actuated, in addition to the desire of his individual good. This social impulse is, he holds, the source of *Jus*, or Natural Law;—the basis of property and contract (Art. 8.) It is, he says, (Art. 16), too narrow a view to say that Utility is the Mother of Rights; the Mother of Rights is Human Nature, taken as a whole, with its impulses of kindness, pity, sociality, as well as its desire of individual pleasure and fear of pain. Human Nature is the Mother of Natural Law, and Natural Law is the Mother of Civil or Instituted Law.

By thus founding Morality and Law upon the whole compass of man's human and social, as well as animal and individual nature, Grotius, as I conceive, makes his system more true and philosophical than many of the more recent schemes of the philosophy of morals. He is thus favourably distinguished, not only from those who, like

Hobbes, found law and morality on the mutual fear of men, and from those who proclaim utility as the basis of their system; but also from later and celebrated dissertators upon Natural Law, such as Kant and Fichte, and other German philosophers. A recent writer* on this subject has justly remarked this distinction: that Grotius does not, as those philosophers do, seek the ground and basis of Rights in the insulated existence of the individual, but in the social relations of men. The critic remarks, also, that we do not find in him that strenuous attempt to separate jural from moral doctrines, which, in the Kantian period, was regarded as the essential condition for the proper development of jural philosophy: nor, again, do we meet in Grotius with that perpetual hammering upon the innate freedom of the Person as such; with the assumption that the Person, in virtue of his mere existence as a Person, is the bearer and possessor of an indefinite mass of Rights, all which may be asserted by force; while yet, on the other hand, the Person may, in cases of necessity, have to acquiesce in the mere possibility of acquiring Right, as the sole result of his Personality. And hence, as the writer just quoted further remarks, we do not find in him the harsh and startling propositions which occur so frequently in the jural speculations of the Kantian period.

The speculations on the subject of *Jus, the Doctrine of Rights and Obligations*, both in the hands of the German writers whom I have mentioned, in those of Grotius†, and in those of the Roman jurists from whom this strain of

* Hartenstein: Darstellung der Rechtsphilosophie des Hugo Grotius. In the *Transactions of the Royal Society of Saxony*, 1850.

† The title of the work in full is, *Hugonis Grotii De Jure Belli et Pacis Libri Tres, in quibus Jus Naturæ et Gentium, item Juris Publici præcipua explicantur*.

speculation was originally derived, proceed upon the supposition that there is a body of Natural Law, *Jus Naturæ*, distinct from Instituted Law (*Jus Gentium* and *Jus Civile*), and belonging to man by his nature. I have elsewhere* endeavoured to shew that though man nowhere exists, and by his nature cannot exist, without Laws, there is no special body of Laws which can distinctively be called *Natural Law*, *Jus Naturæ*. I have noted (*Elements of Morality*, 1052) the inconsistencies into which Grotius, as well as others, is led, when he attempts to exemplify this distinction in particular cases. But I have also (1053, 1054) pointed out the truths which were often expressed by means of this distinction; namely, that the actual Law of any community might be worse than it is; and that it may be better. The *Jus Naturæ* may be the mere rudiments out of which the *Jus Gentium* is to be fashioned; or it may be the lofty ideal which the *Jus Gentium* never reaches. Both these lines of speculation are very interesting and instructive; and we may readily concede to the philosophical jurists the use of the phraseology which they have been accustomed to employ on such questions; and which is often convenient and useful for these and other purposes.

Jus Gentium is a phrase which, about the time of Grotius, was passing from its ancient Roman meaning, *the Law common to most Nations*, to its modern meaning, *the Law between Nations*. The prolix and multifarious character of Grotius's work arises, in a great measure, from his setting out from the first of these meanings, in order to discuss the second. He thus begins with the philosophy of ethics, and ends with exhortations to humanity, truth, and justice, even in the conduct of wars. The latter indeed, was more peculiarly his object than the former; for the narrow and

* *Elements of Morality*, Art. 650. Mr Bentham also denies the existence of such a body of Natural Rights.

savage view which derives law and justice from mutual fear, had not been prominently put forwards in that period, as it was soon afterwards by Hobbes; and Grotius, in debating the question, is driven to seek the opponents of his wider and humaner morality, in the ancient world, among the Grecian sophists. But the miseries arising from unregulated war pressed upon his thoughts with present and severe reality; for the Thirty Years' War had long been ravaging Europe. To this spectacle he himself ascribes the origin of his work. He says (*Proleg.* Art. 28), "I saw prevailing throughout the Christian world a license in making war, of which even barbarous nations would have been ashamed; recourse was had to arms for slight reasons, or for no reason; and when arms were once taken up, all reverence for divine and human law was thrown away; just as if men were thenceforth authorized to commit all crimes without restraint." The sight of these atrocities had led many men, he says, to hold all war to be unlawful to Christians; but he, more temperately, thought that the remedy was to bring it about that war itself should be subject to rules of humanity and decency. And he adds, that he conceived himself in some degree prepared for such a task by the practice of jurisprudence in his own country; and hoped, that, though unworthily ejected from that country, which had been honoured by so many of his works, he might still promote the science by the labours of his pen.

He claims (*Proleg.* 30), to be the first who had reduced International Law to the form of an Art or Science. Nor do I conceive that this claim goes beyond his due: though I am aware that certain writers have been recently brought to light and pointed out as his "Precursors*." The Precursors thus newly brought into notice are Johannes Oldendorp,

* Die Vorläufer des Hugo Grotius auf dem Gebiete des *Jus Naturæ et Gentium*. Von Carl von Kaltenborn, 1848.

whose *Isagoge Juris Naturalis, Gentium, et Civilis*, was published at Cologne in 1539; Nicolaus Hemming, who wrote *De Lege Naturæ Methodus Apodictica*; Benedict Winkler, whose *Principiorum Juris libri quinque* appeared in 1615, ten years before the publication of the work of Grotius. But I see no reason to think that these works did more to anticipate the work of Grotius than the works which he himself enumerates and criticizes, as bearing upon the subject; especially the work of the Oxford Professor of Law, Albericus Gentilis, *De Jure Belli*, Hanoviæ, 1598. In this work, as Mr Hallam has observed, the titles of the chapters run almost parallel to those of the first and third Books of Grotius; and Grotius himself mentions him (along with Balthasar Ayala), as a writer who had been of great use to him: "Cujus diligentia sicut alios adjuvari posse scio, et me adjutum profiteor," (*Prol.* 38). The work of Ayala, *De Jure et Officiis Bellicis*, published in 1582, is conceived by Mr Hallam to have been the first "that systematically reduced the practice of nations in the conduct of war to legitimate rules." But notwithstanding the labours of these authors, we may, I conceive, fully assent to Mr Hallam, when he says of Grotius's work: "The book may be considered as nearly original, in its general platform, as any work of man in an advanced stage of civilization and learning can be. It is more so, perhaps, than those of Montesquieu and [Adam] Smith."

Mr Dugald Stewart has, in his *Dissertation on the Progress of Philosophy*, spoken unfavourably, indeed contemptuously, of Grotius's great work. I am happily relieved from any necessity of replying to this criticism, by the admirable manner in which the task has already been performed by Mr Hallam. That judicious and temperate writer finds himself compelled to refer to Mr Stewart's attack in these terms: "That he should have spoken of a work so distinguished by fame, and so effective, as he

himself admits, over the public mind of Europe, in terms of unmingled depreciation, without having done more than glanced at some of its pages, is an extraordinary symptom of that tendency towards prejudices, hasty but inveterate, of which that eminent man seems to have been not a little susceptible. The attack made by Stewart on those who have taken the law of nature and nations for their theme, and especially on Grotius, who stands forwards in that list, is protracted for several pages, and it would be tedious to examine every sentence in succession. Were I to do so, it is not, in my opinion, an exaggeration to say that almost every successive sentence would lie open to criticism." He then goes on to take the chief heads of accusation; and to his instructive discussion of them, I refer my reader*.

Paley also, in the Preface to his *Moral Philosophy*, censures Grotius for the profusion of his classical quotations; an objection of which I have already spoken, and which I have here tried to remedy; and for the forensic cast of his writings. That in the work of Grotius we see everywhere traces of the juristical training of his mind, is not to be denied; but it may be much doubted whether this is a disadvantage;—whether this legal discipline of the intellect have not given a precision to his divisions and reasonings which they would not have had without the habits so formed. Certainly a jurist would find, in Paley himself, great reason to complain that questions of morality and of law are mingled together in a very confused and arbitrary manner.

It was not the intention of Grotius to furnish a System of Ethics. But if we regard the work as to its bearing on ethical philosophy, it will, in many respects, sustain with advantage a comparison with the work of Paley. Grotius

* *Literature of Europe*, Part III. Chap. iv. § 83.

shews, satisfactorily as I conceive, that *utility* is a very narrow and perverse expression for the foundation of morality (*Proleg.* 16). And the foundation which he himself lays, is far broader and more philosophical (*Proleg.* 6). Man, he says, is an excellent animal, differing from other animals, not in degree only but in nature; and among his peculiar excellencies is a desire for society, a desire for a life spent in community with his fellow-men; and not merely spent somehow, but spent tranquilly and as a reasonable being; *communitatis non qualiscunque, sed tranquillæ, et pro sui intellectus modo ordinatæ*. This desire, or impulse, the Stoics called *οἰκίωσις*, the *Domestic Impulse*. We might be tempted to call it the *Domestic Instinct*; but then, we should have to recollect, that precisely one of the peculiarities which we have here to take into account, is, that man is not governed by Instinct, but by Reason; that in virtue of his human nature, the impulses which belong to him, analogous to the instincts of animals, become conscious and intelligent purposes: and thus personal security, property, contracts and the like, the necessary conditions of a tranquil and reasonable community of life, are necessary results of man's nature. And thus human nature is the source of Rights, as Grotius says, (*Proleg.* 16).

That man forms a judgment of actions, and tendencies to act, as being right or wrong; and that the adjective *right* has a wider range than the substantive *Rights*; are doctrines belonging to man's *moral* nature; and these doctrines lead us to a scheme of morality which has its foundations, as a sound scheme of morality must have, at once in the external conditions of man's being, and in the internal nature of his soul. The *Rights* which his outward circumstances necessarily establish, are recognized and made the cardinal points of *Rightness*, by his inward con-

victions. Among the convictions which belong to man, as a moral creature, is this; that not only his outward actions, but his inward purposes, volitions, affections, desires and habits, ought to be right. This consideration, however, leads us into a region of morality with which Grotius is not much concerned in the present work.

Many of the questions of International Law which are discussed by Grotius, have been the subject of much subsequent discussion; and in several cases, the opinions now generally accepted are different from those which he asserts. To have attempted to notice such cases, would have been, not to edit Grotius, but to compile a Treatise on the present state and past history of International Law. The student of such subjects will necessarily have to read many books; of which, however, this of Grotius is certainly one of the most indispensable. What is requisite in order to correct him, must be obtained by studying the best of his successors.

I hope that the deep and earnest love of Peace which inspired the design of this book, and which breathes so ardently through so many of its pages, will obtain a favourable reception for the work, in these days when the same sentiment is so strongly felt and so widely spread, and has shewn itself in so many remarkable ways. The progress of the study of International Law, on such principles as those of Grotius, and the increase of a regard for the authority of such Law, are among the most hopeful avenues to that noble Ideal of the lovers of mankind, a Perpetual Peace:—the most hopeful, because along this avenue, we can already see a long historical progress, as well as a great moral aim. Grotius himself, as was natural with his views, indulged the hope of such a consummation; as appears for instance, Book II. chap. xxiii. Sect. x. Art. 4, where he says: "It would be useful, and indeed it is almost

necessary, that certain Congresses of Christian Powers should be held, in which controversies which arise among some of them may be decided by others who are not interested; and in which measures may be taken to compel the parties to accept peace on equitable terms." I trust that all Students and Professors of International Law will consider themselves as labouring upon a Problem which is still unsolved, while War exists; and in which all the approximate solutions must make wars more rare and more brief, as well as more orderly and more humane.

Notwithstanding the love of peace and the spirit of humanity which thus runs through the work of Grotius, it has been blamed by some, as sanctioning, by its doctrines, many of the most savage usages of war. But this objection can be made, I think, only by those who have not read the book with due attention. It is true, that in certain parts of the Third Book, he states the customary Rules, according to which wars have always been carried on; which Rules allow killing men, taking prisoners, capturing property, laying waste a country, and the like. And these he calls *the Rights of War*; and gives interpretations of the rules which may seem very severe. But this, he himself notes: and when he has performed this part of his task, he forthwith (in Chap. x.) proceeds to say, "I am now going to take from belligerents what I have seemed to grant to them, but have not really granted:" and then he goes on with a series of Chapters, which he calls *Temperamenta*, Restraints as to the exercise of these Rights of War, derived from considerations of humanity, justice, expedience and piety: and by these "temperaments," he divests war of all the cruelty and hardship which are separable from it. Still, some persons appear to be offended at violent and oppressive practices being called *Rights* in any sense. Upon this, I would

remark, that there would be little use in a writer on this subject stating, as the Rights of War, Rules which never have been observed nor acknowledged in any actual war up to the present time. Killing, taking prisoners and making captures, besieging towns, and the like, are of the essence of war: and these are inevitably violent and painful inflictions. If at any time, the rules of such practices have been harsher than they now are, we may say that such Rules were the Rights of war in barbarous and ferocious times: but even in such times, those Rights imposed a certain restraint upon the victor; as for instance, the Right of making the conquered slaves, prevented his taking their lives. That such Rights are often morally wrong, Grotius himself repeatedly urges. The term *Rights*, like the term *Natural Law*, of which I have just spoken, may mean, either that which is secured to men by existing Rules, in every society, however rude; or that which it ought to be the aim of the most humane and pious men to secure by Rule, as the best condition of society. But this latter is not an ordinary nor convenient sense of the substantive *Rights*. If we were to adopt it, we should have a difficulty in establishing the Right of killing men at all for no crime; and therefore, there could be no Rights of War.

The translation may perhaps be welcome, even to the classical scholar, for Grotius's style is not only very concise and pregnant, but also full of expressions borrowed from the jurists and the schoolmen. But as the text will sufficiently explain these, I have not thought it necessary to translate the Notes, which besides, for the most part, refer to the quotations only.

There have already been published at least three translations of Grotius's work in English, besides a small and worthless abridgement, published in 1654 by C. B. (i. e.

Clement Barksdale, according to Watts). William Evats published a translation (in folio) in 1682, in which an attempt was made (not very happily,) to improve the work, by introducing Grotius's Notes, and other matter, into the text. And in 1738, a translation (also in folio), was published of the text of the work, and of the Notes of Barbeyrac; not only the smaller critical Notes which accompany the present edition, but also of the larger Notes, generally of a juristical and historical kind, which Barbeyrac has appended to his French translation. This edition is anonymous, but bears traces of having been executed by a writer familiar with the literature of jurisprudence. Besides these, there is, I believe, a more modern translation, which I have not seen.

I had no opportunity of consulting the translations of 1682 and 1738, till my own translation was completed; and if this had been otherwise, the scheme of my translation is so different, that I should have had no temptation to borrow from them. I have however taken a few Notes from the edition of 1738.

Barbeyrac's critical notes, given in the present edition, are excellent. They are mainly employed in verifying Grotius's quotations: quotations, often, it would seem, made by drawing upon a memory which appears to have contained in its stores the whole mass of ancient literature. Quotations so collected are often confused and imperfect, as well as difficult to trace. The learning, acuteness, vigilance and felicity, with which Barbeyrac has detected, traced to their origin, and rectified, such mistakes as Grotius has committed, are such as may constantly excite the admiration of the reader. Still, it would not have been proper to publish a new edition of the work without again verifying the references; and especially, enabling the reader to refer to modern editions, instead of those which Bar-

beyrac employs. This task has been executed by the Rev. H. A. Holden, Fellow of Trinity College, who had before performed the same valuable service for the recent edition of Sanderson *De Obligatione Conscientiæ*.

The Notes of Gronovius, which occupy a considerable portion of the page of the most common editions of Grotius, are in reality of very little value. It is doubted by Tydman, a more recent editor, (Utrecht, 1773) whether they were intended for publication; and they may in general be omitted without loss. A few notices taken from them have been retained.

As further illustrating Barbeyrac's labours on this work, I have inserted his Preface, including the passage in which he expresses an unfavourable judgment of the value of the Notes of Gronovius. In this preface, the references to Barbeyrac's own Notes are here made according to the mode adopted in the present edition; namely, by means of the Arabic numerals from 1 to 9; the Notes of Grotius being marked by the letters of the alphabet, as in the earlier editions.

TRINITY LODGE, CAMBRIDGE,
August 23, 1853.

VOLUMINE PRIMO CONTINENTUR

	PAG.
DEDICATIO Auctoris Ludovico XIII. MDCXXV	xix
Præfatio J. Barbeyracii MDCXX	xxiii
Ejusdem MDCXXXV	xxxv
Prolegomena Auctoris in libros tres <i>de Jure Belli ac Pacis</i> xxxvii	

LIBER PRIMUS.

CAP.		
I.	Quid Bellum, quid Jus	1
II.	An bellare unquam justum sit	29
III.	Belli partitio in publicum et privatum. Summi imperii explicatio	94
IV.	De Bello subditorum in superiores	164

LIBRI SECUNDI

CAPITA I—VIII.

I.	De Belli Causis, et primum de defensione sui et rerum.	201
II.	De his, quæ hominibus communiter competunt	227
III.	De Acquisitione originaria rerum, ubi de mari et fluminibus	255
IV.	De Derelictione præsumta, et eam secuta occupatione, et quid ab usucapione et præscriptione differat	276
V.	De Acquisitione originaria juris in personas: ubi de Jure Parentum: de Matrimoniis: de Collegiis: de Jure in Subditos: Servos	294
VI.	De Acquisitione derivativa facto hominis, ubi de alienatione imperii, et rerum imperii	340
VII.	De Acquisitione derivativa, quæ fit per legem, ubi de successionibus ab intestato	351
VIII.	De Acquisitionibus, quæ vulgo dicuntur Juris Gentium	394

LUDOVICO XIII

CHRISTIANISSIMO FRANCORUM ET NAVARRÆ REGI

HUGO GROTIUS.

AUDET hic liber, Regum eminentissime, Tuum sibi augustum nomen inscribere, non sui, non Auctoris, sed argumenti fiducia, pro *Justitia* quippe scriptus: quæ virtus adeo Tua est, ut inde tuis meritis et humani generis suffragio dignissimum tanto Rege cognomentum acceperis, ut jam ubique *Iusti* appellatione non minus quam *Ludovici* noscaris. Speciosi Romanis Ducibus videbantur ex Creta, Numidia, Africa, Asia, aliisque devictis gentibus tituli. At quanto Tuum illustrius, quo significaris nullius populi, nullius hominis, sed ejus, quod injustum est, et hostis ubique, et victor semper? Magnum putarunt *Ægyptii* reges, si patris hic, matris ille, fratrum amans alius dicerentur. At quantulæ hæ partes sunt Tui nominis, quod non ista tantum, sed quicquid pulchrum et honestum excogitari potest, ambitu suo complectitur: *Iustus* es, cum Magni supra omne id quod dici potest Regis Patris Tui memoriam honoras ipsum imitando: *Iustus*, cum Fratrem modis omnibus, sed nulla re magis quam exemplo tuo instruis: *Iustus*, cum Sorores summis matrimoniis ornas: *Iustus*, cum sepultas prope leges revocas, et, quantum potes, ruenti in pejus seculo temet opponis: *Iustus*, sed simul clemens, cum subditis, quos tuæ bonitatis ignorantia ab officii limite transversos egerat, præter peccandi licentiam nihil adimis, nec vim adfers animis circa divina

diversum à te sentientibus: Justus simulque misericors, cum oppressos populos, afflictos Principes tua auctoritate relevas, nec fortunæ nimium licere permittis. Quæ tua singularis beneficentia, et in tantum Deo similis, quantum humana natura patitur, me cogit, ut hac quoque publica allocutione gratias tibi pro me privatim habeam. Nam quemadmodum cœlestia sidera non tantum magnis mundi partibus se infundunt, sed ad singula animantia vim suam patiuntur descendere; ita Tu, in terris benignissimum sidus, non contentus erigere Principes, sublevare populos, mihi quoque in patria male habito et præsidium voluisti esse et solatium. Accedit ad implendum Justitiæ orbem post actiones publicas etiam privatæ vitæ tuæ innocentia et puritas, digna, quam non homines tantum, sed et ætheriæ mentes admirentur. Nam quotusquisque de plebe infima, imo de ipsis illis, qui a mundi consortio se absciderunt, ita se ab omnibus culpis immunem præstat, ut Tu in ea positus fortuna, quæ innumeris peccandi illecebris undique obsidetur? Quantum vero hoc est, inter negotia, in turba, in aula, inter tot tam diversa peccantium exempla id consequi, quod aliis solitudo vix, sæpe ne vix quidem, præstat? Hoc vero est non Justi tantum, sed et Sancti nomen in hac ipsa vita mereri, quod majoribus tuis Carolo Magno et Ludovico piorum consensus post obitum tribuit: hoc est esse non gentilitio sed suo proprio jure Christianissimum. Sed Justitiæ cum pars nulla a te aliena sit, illa tamen, quæ circa libri hujus materiam, id est, circa belli pacisque consilia versatur, eo proprie tua est, quo Rex es, et quidem Rex Francorum. Ingens hoc regnum tuum, quod per tanta tam felicium terrarum spatia in utrumque mare procurrit; sed majus hoc regno regnum est, quod regna aliena non concupiscis. Dignum hoc tua pietate, dignum isto fastigio, non cujusquam jus armis attentare, non veteres turbare fines; sed in bello pacis gerere negotium, nec incipere nisi hoc voto, ut quamprimum desinas.

Quam vero pulchrum hoc, quam gloriosum, quam ipsi conscientiae lætum, ut si quando Te Deus ad suum regnum, quod solum tuo melius est, vocaverit, audacter possis dicere: Hunc ego a Te gladium pro Justitiæ tutela accepi, hunc tibi nullius temere fusi sanguinis reum, purum, inson-temque reddo. Ita fiet, ut quas nos nunc regulas ex libris petimus, in posterum ex Tuis actionibus tanquam ex perfectissimo exemplari petantur. Quod ipsum cum sit maximum, plus tamen aliquid a Te exigere audent Christianorum populi: ut scilicet extinctis ubique armis pax sua non imperiis tantum, sed et Ecclesiis Te Auctore redeat, discatque nostra ætas arbitrium subire ejus ætatis, quam vera sinceraque fide Christianam fuisse Christiani omnes profiteamur. Pertæsos discordiarum animos excitat in hanc spem recens contracta inter Te et sapientissimum pacisque illius sanctæ amantissimum Magnæ Britanniae Regem amicitia, et auspicatissimo Sororis Tuæ matrimonio fœderata. Difficile negotium, propter studia partium gliscentibus in dies odiis inflammata: sed tantis Regibus nihil dignum, nisi quod difficile, nisi quod aliis omnibus desperatum. Deus pacis, Deus justitiæ, Rex juste, Rex pacifice, cum aliis bonis omnibus tum hac etiam laude cumulet Tuam Suxæ proximam Majestatem. cIo Io c xxv.

LECTURIS¹

HANC NOVAM EDITIONEM

S. P. D.

JOANNES BARBEYRACIUS.

QUUM in eo essent Bibliopolæ sollertissimi, ut eximium istud Opus, sæpius recusum et recudendum, typis suis iterum committerent; ac in eo emaculando et interpretando non parum operæ a me positum esse inaudivissent: mecum ultro egerunt, ut suppeditare vellem, si quid ad novam Editionem ornandam conferre commodum esset. Lubens amplexus sum occasionem oblatam de illis bene merendi, qui Jus Naturæ et Gentium, pro merito ejus suæque ipsorum utilitate, amplectuntur, adeoque non possunt non maximi facere Auctorem nostrum, nobilissimæ artis quasi parentem. Et quamquam paullo plus temporis mihi relinqui, quam ferebant rationes Typographorum, valde optassem: tamen vel sic ea præstare me posse existimavi, de quibus suscipiendis nemo hactenus, quod sciam, serio cogitaverat. Rem omnem paucis accipe.

Dum ab aliquot annis, *Lausannæ* adhuc degens, in eo totus eram, ut Libros hosce *De Jure Belli ac Pacis* in Gallicam linguam verterem, et Notis perpetuis illustrarem, ad eum fere modum, quo adfine Opus SAMUELIS PUFENDORFII *De Jure Naturæ et Gentium*, plus simplici vice, jam in publicum emisi: necessarium mihi aliquatenus visum est, utilissimum saltem instituto meo felicius perficiendo, veteres Editiones Grotiani scripti, quæ præsertim vivo Auctore lucem viderunt, mihi comparare, et cum novissimis, quæ solæ omnium manibus teruntur, adcurate conferre. Nimirum sæpius observaveram, ejusmodi Librorum, quorum usus et pretium postulat, ut identidem repetitis vicibus præla exerceant, Editiones ultimas minus ac minus tersas purgatasque prodire ut plurimum: tantum abest ut sint emendatiore,

¹ Præfatio Editoris in priorem Editionem Anni 1720. Cui subjicitur monitum de editione posteriore.

quemadmodum titulus vulgo ementitur. Neque heic aliter sese rem habuisse deprehendi. Immo priores illas et optimas, quæ ad recentiores emendandas plurimum juvabant, ipsas haud raro manu medica egere, certissimis argumentis comperi.

Usui mihi maxime fuit, quod adinet ad ipsum Opus, sine Notis Auctoris, quæ postea accesserunt, prima omnium Editio, quæ sub ipsius Auctoris oculis prodiit *Lutetiæ Parisiorum*, anno *Æræ vulgaris* M. DC. XXV. Magnum deinde adjumentum adtulit illa anni M. DC. XXXII. minore forma typisque nitidissimis *Amstelodami* excusa, apud *Gulielmum Blæu*, et expressa ad exemplar ab ipso Auctore recognitum atque emendatum, ut idem præsens *Amstelodami*, die 8 Aprilis ejusdem anni, testatur, in pagina post titulum aversa. Ex illis duabus Editionibus, aut ex alterutra, plurima loca emendavimus, quæ in omnibus vel plerisque posterioribus vitiosa erant. De talibus autem emendationibus aliquando occasione data, vel ubi consultum videbatur, monuimus: sed omnes indicare, superflue cujusdam fuisset diligentie; nec patiebatur Lectorum commoditas, ut his et aliis hujusmodi moles voluminis augeretur. Ut tamen, quid hac in parte præstiterimus, Lectori manifestum fiat, aliquod heic specimen exhibere placuit locorum, quæ tacitus, optimis Editionibus præeuntibus, correxi.

Non diu quærenda erunt exempla. Offert se statim Lib. I. cap. III. § 17. num. 2. init. *Multi adversus talem statum quasi bicipitem incommoda multa* ADFERUNT. Ita reposuimus ex prima Editione, quum in aliis omnibus perperam legatur *deferunt*. Lib. II. cap. v. § 9. num. 4. *Quod si qui populi continentius egerunt, ut Romani, etc.* Vox *qui*, manifesto necessaria, ex omnibus Editionibus, post illam primam, hactenus abfuerat. Eodem capite § 13. num. 1. eandem ducem sequutus, verba sequentia ita edi jussi: *Colligi videtur ex illis Dei verbis* APUD *Mosem, etc.* quum in aliis omnibus antea scriptum fuisset *ad Mosem*. Similiter Lib. II. cap. XI. § 18. num. 1. in fine: *Naturaliter videtur mihi* ACCEPTANTI *jus dari efficiendi, ut, &c.* Illud *acceptanti* ex Editione prima restitutum est: ultimæ *acceptando* fecerant ex *acceptandi*, quod in Editionem anni 1632 prave irrepserat. Ejusdem Lib. cap. XX. § 40. num. 1. *sub init.*: *Sed et ob eas, quæ ipsos peculiariter non tangunt, sed in quibusvis personis jus naturæ aut gentium immaniter* VIOLANT. Sic edidimus, ex Editione prima, et altera anni 1632 reliquæ enim omnes illud *violant* in *violantibus* aux-

erant, contra id quod series orationis et sententia manifesto postulabant. Aliquando etiam plures exciderant voces, sensum plenum efficientes: cujus παραράματος exempla videre poteris paullo post locum jam adlatum, ubi monuimus, in Nota 7. et cap. xxiii. Lib. II. § 13. num. 1. ut ostendit Nota 1 ibi subjecta. Neque enim Auctori ulla erat ratio tales sententias postea ejiciendi: in quod ante omnia adcuratissime inquisivimus heic et alibi, quotiescumque aliquid quacumque de causa mutandum aut suppleendum videbatur.

Hoc primum. Quod, quamvis in se spectatum non leve sit, et solum ad commendandam Editionem nostram sic satisfactorium erat: parum tamen est, si cum iis conferatur, quæ sine ullo auxilio, et ex proprio nostro Marte, exsequuti sumus, tum in contextu, tum in Notis Auctoris recensendis et expendendis. Præcipua breviter enumerabimus: unde Lector æquus et benignus facile judicare poterit, an operam nostram ultra modum venditemus.

Igitur non pauca loca immutavimus aut supplevimus, quæ in omnibus Editionibus mendosa aut manca erant, et adtendenti non possunt non talia videri: sive error aut defectus a calamo Auctoris ipsius orti sint, sive ab Exscriptorum aut Typographorum incuria, oculos Auctoris, dum raptim verba perlustrat, in repetitis etiam operis sui recensionibus, postea fallente. Exempla indicavimus Lib. I. cap. i. § 16. num. 7, nota 9; et cap. ii. § 10, num. 4, nota 7: cap. iii. § 11. num. 1, nota 5; et § 16. num. 5, nota 8. Lib. II. cap. xii. § 10, nota 4 et cap. xx. § 40. num. 4, nota 1. Lib. III. cap. xiii. § 1, nota 2. Sed non minus necessaria erat emendatio aut additio in aliis locis; ubi non monuimus. En heic etiam specimina nonnulla. Lib. I. cap. ii. § 8. num. 4. περὶ χρυσίου διαφέρεισθαι. Ita edidimus, ut habet PHILOSTRATUS, cujus hæc sunt verba, et ipsius Auctoris versio postulat: antea legebatur διαλέγεσθαι, quod mendum ab Editione anni 1632. ubi locus additus fuerat, ad omnes postea Editiones propagatum. Lib. II. cap. v. § 22, bis emendavimus Cibyra, ex STRABONE, unde narratio facti petita est, pro Libyca, quod omnes Editiones insederat, ab ipsa usque anni 1632, cujus etiam hoc erat additamentum. Sequenti § 23. prima Editio, et omnes aliæ hactenus habuerant: τοὺς νόμους ἀπαγορεύειν, etc., ubi ex ARISTOTELE reposuimus ἀγορεύειν, ut res ipsa requirit, et Auctoris interpretatio, alias contrarium sensum voci Græcæ habitura. Lib. II. cap. iv. § 3 circa

initium: *Non fuerat congruum naturæ humanæ, quæ nisi ex signis ANIMI actus cognoscere non potest.* Vocem animi addidi, quæ in præcedentibus legitur, nec sine damno sententiæ hinc abesse potest; aberat tamen jam in prima Editione. Ejusdem Lib. cap. ix. § 7. in fine: *contra eos a communi sociorum CONCILIO res judicata est.* Vox concilio, omnino necessaria, in Editione anni 1632. ubi exemplum additum, exciderat: unde nil mirum, si in nulla sequentium hactenus suppleta fuerit. Sic cap. x. sequenti, § 6: *Quarto non teneri eum ad RESTITUENDOS fructus, etc.* omissionem vocis *restituendos*, adeo manifestam, quum in primam Editionem irrepsisset, omnes deinceps religiose servaverant. Non ita obvia, sed tamen adtendenti ad seriem orationis facile patere poterat ea, quæ reperiebatur ejusdem Libri cap. xii. § 12. num. 1. *Ut etiamsi nec celatum quidquam sit, etc. si in re tamen deprehendatur inæqualitas, etc.* Particula *si* in omnibus Editionibus deerat, quæ tamen ad ratiocinationis nexum omnino est necessaria. Cap. xxi. § 11. *init. occasione quidem alicujus peccati ALIENI, etc.* Illud *alieni* in nulla hactenus Editione comparuerat; quod tamen sententia manifesto postulat. Aliquando verba supervacanea relicta fuerant, quæ sensum turbabant: cujus rei exemplum luculentum, videre poteris Lib. II. cap. vii. § 2. num. 1, nota (c). Sensui etiam nonnunquam nocuerat prava interpunctio, constanter servata: adeo ut, propter tale vitium, Lib. III. cap. xi. § 6. num. 1: *Phœnces, in Græcia, consanguinei statuuntur Cæritum in Etruria,* ac propterea Auctor noster a GRONOVIO carpatur, et hic se ipsum inanibus conjecturis, ad detegendum fontem erroris, torqueat; ut ex iis, quæ Notæ illius 47 subjeci, cuivis intelligere licet. Sed hæc abunde sufficiunt, ad ostendendum quam necessaria fuerit opera nostra, in emaculandis et restituendis locis non paucis posita, ubi nullum erat a prioribus et emendatissimis Editionibus subsidium.

Præterea rem prope immensi laboris adgressus sum, ad quam nullus horum Librorum Interpres, et ne quidem eruditissimus J. FRIDERICUS GRONOVIVS, umquam data opera animum intenderant, sed tantum prout memoria suggerebat, aut aliud agendo dabatur occasio: ut nimirum omnia loca Scriptorum, Veterum præsertim, quæ ab Auctore nostro adferuntur aut indicantur, in ipsis fontibus, quantum fieri posset, quærerem, et plerumque accurate expenderem. Hoc autem, ut utilissimum, aliquando etiam valde necessarium erat ad mentem Auctoris intelligendam:

ita ad infinitos errores animadvertendos, tum in numeris Librorum, Capitum, Versuum, tum in designatione Scriptorum laudatorum, tum in verbis eorum referendis, tum in rebus ipsis, plurimum mihi profuit, et Lectoribus, spero, commodum erit. Qui Editionem nostram cum quibusvis aliis conferre voluerit, is statim deprehendet innumera ejusmodi passim emendata, et in ipso contextu, et in margine, et in Notis, etiam ubi Auctori propositum erat quam adcuratissime loca in testimonium aut illustrationem adducta referre, et facillima quærentibus reddere. Aliquando mendum erat in numero Libri, nonnumquam in numero Capituli aut Versus, haud raro in utroque. Interdum etiam unum Opus Auctoris cujusdam pro alio indicabatur; exempli gratia, PLUTARCHI *Themistoclis* Vita, pro *Artaxerxis*; Lib. I. cap. III. § 16. num. 3. HERODOTI *Urania*, seu Lib. VIII. pro *Calliope*, seu Lib. IX. laudabatur, Lib. III. cap. XI. § 3. num. 2. Ubi, quod obiter observo, error inde manasse videtur, quod Editio Herodotea HENRICI STEPHANI, pure Græca, qua Auctor noster utebatur, sic mendosa sit in titulo paginæ, unde locus adlatus depromptus fuit: quo modo potuit alibi nonnumquam Auctor deceptus in errorem Lectores conjicere: plerique tamen ex ipsius festinatione aut incogitantia nati videntur. Sic ab ipsius manu omnino est, quod Lib. II. cap. XXI. § 13. num. 2, nota (n) PHILONIS scriptum laudetur *De Pietate*, quod nullum exstat, pro libro *De Nobilitate*; ut ibidem observavi. Ejusdem Libri cap. præcedenti XX. § 30, nota (r) remittimur ad verba LUCÆ *apud Xiphilinum*; quæ verba sunt *Marci Antonini* Imp. ut in subjecta Nota nostra ostendimus. Sed est etiam ubi Scriptor unus pro alio certissime indicatur: ut ISOCRATES, pro DIONYSIO HALICARNASSENSIS, Lib. II. cap. IV. § 2. ubi vide notam 1; alibi, pro ÆSCHINE, cap. XXIII. § 8. num. 1. ut patet ex Nota 5. Vicissim DEMOSTHENES pro ISOCRATE, Lib. II. cap. XV. § 6. num. 1. Alias HIPPODAMUS, pro HIPPARCHO, Lib. II. cap. V. § 12. num. 3. LYSIAS, pro ANDOCIDE, *ibid.* § 13. num. 2. SENECA, pro PLINIO, Lib. II. cap. II. § 2. num. 2. nota (o). JUSTINUS, pro CURTIO, ejusdem Libri cap. VII. § 9. num. 3. ubi vide, quæ subjecimus notæ¹ 62. Immo EUTROPIUS, Auctor *Breviarii* Latini, pro DIONE CASSIO *Historico Græco* testis indicatur vocis Ἀρρίφρυχοι, de Vadibus usurpatæ, Lib. II. cap. XXI. § 11,

[¹ Gronovianam dicit; notat autem l. c. Barbeyracius, ea quæ Justino Lib. X. tribuit Grotius, revera Q. Curtii esse, Lib. X. cap. VII. n. 2. H. A. H.]

nota (k). Aliquando duo loca diversorum Scriptorum in unum compinguntur, ut SERVII et SENECAE, Lib. II. cap. II. § 13. num. 5, nota (p).

Sæpissime autem Auctor, unde aliquid petitur, simpliciter nomine suo indicabatur, nulla mentione facta Operis, Libri, nedum Capitis aut Versus; adeo ut, si quis locum quærere voluerit, quem numquam legerat, aut cujus non meminerat, omnia Opera laudati Scriptoris ei pervolvenda fuerint: quod ita molestum est, præsertim si magnæ molis sit collectio, qualis haud raro occurrit, ut plerique Lectores malint Auctori, forte perperam alios in testimonium vocanti, fidem habere, aut rem, de qua agitur, non satis intelligere, quam tantum laborem quærendi in se suscipere, cum periculo etiam operæ frustra impensæ. Aliquando equidem, vel ex Indicibus, vel ex memoria nostra, vel ex re ipsa, loca quædam haud ita difficulter potuimus invenire. Sed plerumque inde nihil nobis erat subsidii, ut ex propria experientia quivis, si velit, facile poterit intelligere. Hoc tamen non obstitit, quominus loca fere omnia, quæ alicujus erant momenti, citius aut serius invenerimus: adeo ut quæ adhuc invenienda supersunt, aut a nobis investigari non potuerunt, quod Libri, unde adducuntur, non essent ad manum, paucissima sint, præ maximo numero repertorum, et accuratissime a nobis vel in ipso contextu, vel in margine, vel in Notis, designatorum. Nonnumquam ipsum nomen Scriptoris, ex quo verba quædam Auctor noster exscripserat, incuria nescio cujus, omissum fuerat, ut DIODORI SICULI, Lib. II. cap. xx. § 30, nota (s). Sunt etiam loca, quæ diu frustra quæsita, quantumvis pertinaci labore, numquam reperire potuissemus, nisi forte aliud agendo sese nobis ex improvviso obtulissent. Et tamen talia interdum pessime adlata, aut aptata,prehendimus: cujus rei specimen suppeditabit fragmentum *Dionysii Milesii* apud PHILOSTRATUM, unde Auctor noster tacitus illud retulerat, Lib. II. cap. xxv. § 9. num. 1. ubi vide notam 8.

Sed et alibi, sive facile, sive difficulter loca laudata inventa a nobis fuerint, errores bene multos observavimus, tum in locis Auctorum exscribendis aut vertendis, tum in eorum ad rem ipsam, de qua agitur, adcommodatione. Horum omnium exempla volumen aperiienti statim sese offerent. Loci simul perperam descripti et versi unum indicare suffecerit: is est JOSEPHI, cujus verba referuntur Lib. I. cap. iv. § 7, nota (y). Auctor noster, ut probet, secundum quosdam, spem resurrectionis caussam fuisse

introduciti moris sepeliendorum corporum, Lib. II. cap. xix. § 2. num. 3. locum adfert PLINII, qui tamen nil habet, quod ad rem faciat. Eodem Capite, § 3. num. 2, sepulturam deberi mortuis, inter alia, probatur ex juramento *Græcorum* adversus *Persas* militantium, ubi tamen de sociis solis agitur, ut patet ex loco DIODORI SICULI, quem Auctor noster in animo habuit, et ego adtuli in nota 8. Unde etiam exemplum petere potes curæ non pœnitendæ in toto isto Opere passim adhibitæ, ut scilicet multa ex Historiis et Antiquitate, sine teste, sine auctore, prolata, ubinam reperirentur, indicare, quotiescumque res alicujus erat momenti, nec omnibus obvia. Aliquando facta vel dicta diversorum, aut diversa, inter se confunduntur. Sic Lib. II. cap. xxii. § 1. num. 2. ex LIVIO dicitur, *Antiochum*, falso aliquo prætextu, in *Romanos* bella suscepisse; ubi tamen de *Bœotis* agitur, non de illo Rege. *Brasidæ* Lacedæmonio tribuitur cavillatio, quæ Præconis est, ab *Atheniensibus* missi, Lib. II. cap. xvi. § 6. Ubi de bello *C. Jul. Cæsaris*, cum *Germanis* sermo fit, Lib. I. cap. iii. § 5. num. 4. confunditur prœlium adversus *Usipetes* et *Tenchteros* commissum, antequam *Cæsar* primum ponte *Rhenum* trajiceret, cum victoria, fere biennio post, de *Treviris* ab ipso relata: simulque caussa, propter quam *Cæsarem* dedi *Germanis* censuerat *Cato*, pervertitur. Nonnumquam una eademque res bis, tamquam diversa, narratur, ut judicium *Arriani* de vindicta *Alexandri* in *Persas*, Lib. II. cap. xxi. § 8. num. 2, ubi vide notam 9. Immo est ubi Auctor noster contrarium plane adserit ejus, quod dicitur in loco, unde palam vel tacite hausit id, quod statuit. Exempli gratia, Lib. II. cap. vii. § 4. num. 3. vult, *Solonem* legibus suis cavisse, ne Parentes tenebantur Liberis naturalibus aliquid relinquere; quum tamen Legislator ille tales Liberos contra solverit necessitate alendorum Parentum, ut patet ex PLUTARCHO, cujus locum adduxi in nota 5: nam et aliquid de facultatibus paternis Nothis relinqui debuisse, constat ex iis quæ habet JOANNES MEURSIUS, *Themid. Attic.* Lib. II. cap. xii. Talia παραρρήματα, aut ἀμαρτήματα μνημονικά, aliquando plura intra paucas lineas occurrunt, ut Lib. I. cap. iii. § 8. num. 7, nota (x). Et illis scatent capp. xviii. et xix. Lib. II. quemadmodum ex speciminibus ibi adlatis adparet, et Notæ nostræ Gallicæ copiosius ostendent.

In iis omnibus aliquid humani passum esse Virum Summum, si quis miretur, ego vicissim mirabor, quod ei in mentem non

venerit, hoc esse vitium commune omnium hominum, etiam Eru-
ditissimorum, ut non semper ad omnia satis adtendant. Præterea
id nostro accidit, quod iis solenne est, qui magna memoria pollent,
ut scilicet illi nimis secure confidant. Adde quod variis distrac-
tus negotiis et studiis, eo tempore sic satis brevi, quod in hoc
opere elaborando consumsit, forte etiam non paucis eorum Li-
brorum, quos tanto numero laudavit, destitutus; non potuit
semper adcurate omnia expendere. Hinc licet infinita ejus esset
lectio, et vix ullum, puto, Auctorem indicaverit, cujus scripta non
perlegisset, aut saltem perlustrasset; aliquando loca quædam ex
aliis, tunc minime inspecta, tacitus exscripsit, et sic in errorem
delapsus est, ut ex certissimis indiciis deprehendi. Exemplum
manifestum habes Lib. II. cap. XVIII. § 1. nota (a). ubi verba
CUJACII pro verbis VARRONIS adfert, errantem sequutus DIONY-
SIUM GOTHOFREDUM in L. 17. D. De Legationib. ut alibi eodem
festinanter lecto, etymologiam vocis *Territorium*, a *terra* peti-
tam, FRONTINO tribuit, quæ CUJACII etiam est, Lib. III. cap. VI.
§ 4. num. 2. Sic Lib. I. cap. II. § 3. num. 2. verba, tamquam
PLINII, refert, quorum pars tantum apud illum scriptorem legitur,
ut in nota 5 ibi monui. Post Notam illam autem typis man-
datam, casu reperi fontem erroris, in MARCI LYCKLAMA, Juris-
consulti Frisii, *Membranis*, quæ anno 1608 prodierant, Lib. VII.
Eclog. XLII. pag. 394, ubi conjunctio illa duorum locorum per-
peram facta eodem plane modo legitur.

Neque talia, aut etiam graviora peccata, ad res ipsas spec-
tantia, sine exprobratione notari, Auctor ipse, si in vivis esset,
sæpe ferret. Quin potius, quo erat ingenio, monentibus gratias
habiturum et acturum fuisse, mihi persuasum est. Nonnulla
ipse, postquam animadvertit, statim emendavit, ut ex compara-
tione priorum Editionum aliquoties observavi. Exempli gratia,
Lib. II. cap. XXIV. § 3. num. 1. in prima Editione JOSEPHO
verba tribuebat, quæ PHILONI postea restituit. Lib. II. cap.
XVIII. § 7. in eadem Editione, ubi dictum quoddam *Scipionis* ex
LIVIO narraverat, a VALERIO MAXIMO *hanc ei tributam vocem*
addebat: Isto te metu, Hanno, fides civitatis nostræ liberat.
Distinxit deinde sic, quæ male confuderat: *Valerius Maximus*
Consulibus Romanis in facto simili, sed antiquiore, hanc tribuit
vocem; Isto te metu, etc. Lib. II. cap. XV. § 3. num. 1. de loco
SENECÆ Patris ita habet prima Editio: *Non ad antiquos illos*
Imperatores pertinet, id est, belli duces, sed ad Cæsares, qui

jus omne populi in se transferebant. At nunc ibi contra legimus: Ad antiquos eos pertinet, qui speciale ejus rei mandatum acceperant.

Libere igitur, sed modeste, ejusmodi *maculas*, a nobis observatas, *quas aut incuria fudit, aut humana parum cavit natura*, ad utilitatem Lectorum, indicare nos posse putavimus, salvo honore Viri Magni, cujus eruditionem, ingenium, judicium, virtutes, nemo est qui pluris faciat, quam nos. Neque heic substitimus: sed etiam, sicubi nobis haud satis recte ratiocinari visus est, aut principia parum firma ponere (quod non potuit non aliquando evenire illi, qui in vastissima disciplina, arte et via, tradenda, glaciem frangebat,) id simpliciter et candide monuimus in *Notulis* nostris; de quibus jam aliquid dicendum, ut, quales illæ sint, et quid in illis quæri debeat, quisque scire possit.

Et primo quidem, ut ipsa appellatio statim innuit, in eis quam brevissime, quæ dicendæ erant exprimere mihi propositum fuit, ne moles voluminis, jam satis spissi, nimis augetur: quæ de *caussa* etiam nonnulla, quæ, in contextu jam posita, noster immemor in *Notis* suis, totidem verbis, aut eodem plane sensu, repetierat, audacter expunximus.

Duplicis autem generis sunt *Notulæ* nostræ, in universum spectatæ. Aliæ enim, quas *criticas* vocare licet, in eo positæ sunt, ut vel rationem emendationum aut supplementorum, ubi id consultum visum est, reddant; vel Auctoris *παροράματα* in male referendis aut aptandis verbis Scriptorum laudatorum, quando etiam utile existimavi, indicent; vel originem errorum ejus ostendant; vel sine teste prolata idoneis auctoritatibus firment, aut alia ejusmodi doceant. Interdum etiam, sed raro et obiter, natas mihi conjecturas proposui, de emendandis locis Veterum quibusdam, quæ in ipsis fontibus vitiosa videbantur. Alterius vero generis *Notulæ* nostræ *ad res ipsas pertinent*, et in eis modo Auctoris mentem, ubi obscurior, etiam adtendentibus, esse potest, breviter exposui; modo ejus errores, circa principia, aut ratiocinationes, indicavi, in præcipuis saltem argumentis. Neque enim ratio brevitatis, jam adlata, patiebatur ut omnia expenderem, aut quidquam fusius deducerem. Hinc sæpiissime satis facere me posse putavi, Lectorem tantum remittendo, vel ad Opus eximium PUFENDORFII *De Jure Nat. et Gent.* ac nostras in eum Gallice versum *Notas*, jam plus semel editas; vel ad ejusdem Libri Compendium, cui titulus, *De Officio Hominis et Civis*, nostris etiam *Notis* Gallice illustratum, et sæpius recusum; vel ad *Notas*

nostras in hos ipsos Libros *De Jure Belli ac Pacis*, qui Gallice versi, haud ita post longum tempus, Deo dante, publici juris fient. Ex illis Versionibus nostris, ita adornatis, peti poterit, ut speramus, justus in utrumque Auctorem Commentarius, qui et ad intelligendos duos illos Juris Naturalis et Gentium Interpretes palmarios, et ad intima nobilissimæ utilissimæque disciplinæ adyta penetranda, nisi fallor, satis erit; viam certe facilem sternet. Commentatores autem, quos satis multos, nonnullos molis haud exiguæ, noster hic habuit, quam parum nobis adjumenti in toto isto negotio adtulerint, ex collatione patebit; et de eo aliquid forte dicemus in Præfatione ad Versionem jam memoratam. Necessaria tamen fuisse ea omnia quæ præstitimus, præstare saltem conati sumus, vel ex eo intelligi potest, quod stylus Auctoris brevissimus per se satis negotii facessat Lectoribus, et adtentos quam maxime postulet: ut minimus error sive in rebus ipsis, sive in verbis, difficultates inextricabiles nonnumquam parere queat.

Habes heic etiam, LECTOR, V. C. JOANNIS FRIDERICI GRO-
NOVII Notas, quæ, ex quo lucem primum viderunt, Editionibus omnibus sequentibus comites datæ sunt, et, propter famam viri, sequuntur adhuc, ut conjicere licet, porro dabuntur. In illis expendendis, et emendandis aut notandis erroribus, quibus scatent, amplissimus se nobis obtulisset campus, sed et ingrattissimus labor subeundus fuisset: id vero nec tempus, nec animus sinebat. Absit ut meritis Viri Celeberrimi quidquam detrahamus. Sua manet et manebit illi laus in perpetuum, eruditionis profundæ, lectionis diffusæ, et acuminis miri in rebus Grammaticis et Criticis, quæ in scriptis ejus, cedro dignis, ubique micant. Sed, si verum dicere volumus, huic nostræ disciplinæ Juris Naturalis et Gentium, ne de aliis dicam, non eam operam dederat, ut in Auctore nostro interpretando talem se præstare posset, qualem, exempli gratia, in LIVIO recensendo et explicando omnes mirantur. Perpauca heic sunt bonæ frugis: plurima supervacua, et quæ vel aliis tantum verbis sensum Auctoris satis clarum exhibent, vel usui esse possunt solis tyronibus in Lingua Latina, quales certe esse non debent, qui hoc Opus legere adgrediuntur. Sed et a mente Auctoris nostri, cujus principia non satis intelligebat, Vir Doctissimus haud raro aberrat. Et ne putes nos id gratis adserere, specimina quædam Tibi dedimus, dum obiter Notas illius, inter recensendum Opus istud, perlustraremus. Vide, exempli gratia, Lib. I. cap. II. § 10. num. 11. not. 77, et cap. III. § 8.

num. 6. not. 84. Lib. II. cap. i. § 3. not. 34. et cap. III. § 4. not. 12. cap. ix. § 11. not. 67. cap. xi. § 7. not. 60. cap. xii. § 18. not. 89, &c. Immo in iis, quæ occurrunt ad Antiquitates et Artem Criticam spectantia, aliquando videtur plane alius, ac ubi in veteribus Græcis aut Latinis exponendis versabatur: ut Lib. I. cap. III. § 15. not. 65; Lib. II. cap. xxii. § 1. not. 7, et § 5. not. 16; Lib. III. cap. xx. § 7. not. 21, et alibi. Talia, ut jam dixi, aliud agendo tantum notavimus: ne quis putet, nos probare ea, de quibus siluimus. Tantum abest enim, ut de omnibus Notis Viri Eruditissimi excutiendis cogitaverimus, ut contra in oculos incurrentes falsas explicationes aliquando data opera indicare noluerimus, quod verba Auctoris satis clara nobis viderentur, ut nemini adtendenti fraudi esse posset error Interpretis. Neque etiam id negotii nobis datum putavimus, ut loca Veterum ab illo laudata in ipsis fontibus quæreremus, satis superque habentes, si errores in numeris sponte sese offerentes tolleremus, ut et menda sive typographica, sive orta e vitioso codice, unde Notæ Viri Doctissimi primum editæ sunt; neque enim ad manum fuit prima illa Editio. Vel sic tamen longe emendatiores nunc prodeunt, ut ex collatione præcedentium Editionum cum hac nostra cuius manifestum erit.

Superest ut doceamus, quomodo Lector dignoscere queat ea, quæ nostræ industriæ debentur, ubi scilicet id egimus ut distinguere possent, nulla comparatione cum aliis Editionibus instituta. Nam, ut ex jam dictis intelligitur, plurima sunt loca, vel ex veteribus Editionibus, vel sine illarum ope, ex certissimis rationibus tacite emendata: tum errores in designatione Librorum, Capitum, Versuum, &c. fere semper expunximus, nulla mentione facta, nullo indicio dato correctionis; quod molem voluminis inutiliter auxisset, et speciem paginarum deformem aliquatenus reddidisset. Qua de causa etiam in margine, ubi addidimus titulum, numerum Libri, Capituli, Versus, Paginæ, nullam distinctionis notam ullibi adposuimus. Sed in ipso contextu, aut in Notis, tales additiones signavimus duobus uncis, sæpius hoc modo (), rarius isto []¹. *Notulæ* autem nostræ vel separatæ omnino sunt, et tunc a Grotianis vel Gronovianis distinguuntur literis duplicibus ab initio positis, hac ratione (aa)²: primis autem nominis nostri in fine sic

¹ Additions peculiar to the present edition are distinguished by double brackets, thus [].

² In the present edition Barbeyrac's Notes are marked by the Arabic numerals from 1 to 9: the Notes of Grotius being marked by the single letters of the Alphabet, as in the earlier editions.

subjectis *J. B.* Vel Grotianis aut Gronovianis permiscentur, et tunc plerumque illis subjiciuntur, duobus uncis formæ posterioris inclusæ, et nominis nostri primis litteris in fine additis: aliquando autem ubi nimirum res ferebat, et illæ brevissimæ erant, intra ipsam Notam Auctoris aut Interpretis, eodem adposito signo, collocantur; nisi quod heic haud raro nomen nostrum non adparet, sive quod res tanti non erat, seu quod omissum fuerit a Typographis, qui etiam uncas, vel alterutrum, alibi nonnumquam omiserunt, ubi tamen facile hoc a Lectore poterit animadverti.

Est et aliud, quo hanc nostram Editionem ornare, et facilitatem ac utiliore reddere lectionem Operis, ut magna rerum varietate et copia referti, ita stylo brevissimo conscripti, plurimum voluisssem, lubens etiam hunc in me laborem suscepturus: ut scilicet numeros, in quos singuli paragraphi distincti sunt, haud raro mutarem. Subdivisio illa non est a manu Auctoris, neque primarum post mortem ejus Editionum, et nescio a quo facta fuerit. Sed, quisquis ille sit, negligenter admodum in eo negotio se gessit, et aut parum intellexit seriem ac discrimen rerum et argumentorum, aut ad ea parum adtendit. Sæpissime ea distingui numeris videas, quæ manifesto conjungi debent; et viciissim in unum numerum coniecta, quæ distinguenda omnino erant. Hoc certe non potest non morari Lectorem nondum brevitati Auctoris nostri adsuetum: cui ex sola rectiori distinctione singulorum capitum statim lux orta fuisset. Sed tamen, quum jam subdivisio illa, ut ut perperam concinnata, usu recepta quasi fuerit, et eam omnes in laudando Auctore nostro passim sequantur: dandum id mori putavi, ut ne illam immutarem. At vero in Versione mea Gallica, ubi plus juris, hac in parte et aliis, mihi sumere potui, singula quæque, prout res ipsa et Lectorum commoda mihi postulare visa sunt, ubique separabuntur.

Nil aliud est, quod in limine heic Te moneam, LECTOR BENEVOLE, nisi ut ante omnia perlegere velis, et suis locis aptare, EMENDANDA et ADDENDA, quæ subjeci. Neque ideo putes, negligenter curatam esse hanc Editionem, nec talem esse, qualem titulus profitetur. Vix fieri potest, ut, in Opere præsertim tam longo, numquam remittatur diligentia aut Editoris, aut Typographorum, aut eorum qui speciminibus emendandis præsent. Quodcunque peccatum tantilli momenti mihi visum est, dum folia transmissa perlustro, in commodum tuum notare non piguit: et, si quæ supersint errata, a me non animadversa, ea facile a Te deprehensum iri confido. Quæ qualiacumque sint, hoc possum

Tibi liquido adserere, nullam Editionem Grotiani Operis ita emendatam et utentium utilitati adcommodatam hactenus prodiisse Vale. Scribebam *Groningæ*, ipsis Kalendis Novembr. Anni *Æræ Christianæ vulgaris M. DCC. XIX.*

ITA præfabar ante annos quindecim, et quod excurrit. Quum autem de Opere recudendo cogitare necessum esset, omnia iterum recensui, et non pauca heic illic Notulis meis ut fert earum modus, addidi. Plurima loca Auctorum laudatorum, ex iis quæ nondum repereram, aut, deficientibus tunc Libris unde petita erant, quærere non licuerat, inventa postea signavi, ut jam in ipsis fontibus ea quoque inspiciendi cuivis sit facultas data: aliquando etiam indicavi, unde haberet Noster, quæ non suis auctoribus adscripserat et quænam causa erroris ei fuerit. Ad summam, in omnibus eandem rationem, ac antea, tenui, ut, quantum fieri posset, ornatior adhuc nova prodiret Editio. Vellem ut omnibus mendis typographicis vacua hæc esset: sed quum id vix sperari queat in ullo Libro typis describendo, nedum tali, quale est Opus istud Grotianum: quæcumque errata, aut omissa animadverti, quæ tantilli momenti essent, notavi; ut, postquam ex indice quis ea correxerit, nihil, puto, superfuturum sit, quod eum moretur. Ceterum e Versione mea et Notis Gallice scriptis, ad quas, nondum editas, in priori recensione, remittebam, plenior eorum explicatio, quæ in Notulis meis dixi, et multa alia, quæ heic dici non erat mei consilii, peti jam possunt. Scribebam *Groningæ*, Nonis *Februarii*, Ann. M. DCC. XXXV.

IN TRES LIBROS

DE JURE BELLI AC PACIS

PROLEGOMENA.

I. **JUS** civile, sive Romanum, sive quod cuique patrium est, I.
Jus Gentium.
aut illustrare commentariis, aut contractum ob oculos ponere aggressi sunt multi; at jus illud quod inter populos plures aut populorum rectores intercedit, sive ab ipsa natura profectum, aut divinis constitutum legibus, sive moribus et pacto tacito introductum, attigerunt pauci, universim ac certo ordine tractavit hactenus nemo: cum tamen id fieri intersit humani generis.

2 Vere enim Cicero præstabilem hanc dixit scientiam, ¹in federibus, pactionibus, conditionibus populorum, regum, exterrarumque nationum, in omni denique belli jure et pacis. Et *belli et pacis.*

¹ Non dicit CICEBO, *præstabilem hanc esse scientiam*, sed Cn. Pompeli, quem laudat, *præstabilem esse scientiam*, ut in omni genere ac varietate artium, ita quoque, et quidem præcipue, in *federibus etc. in omni denique Belli Jure ac Pacis*. Adeo ut eadem non sit sententia, et nonnisi per consequentiam inde deduci possit, quod Auctor inten-

dit. Mirum autem, id non observatum fuisse ab Eruditissimo Gronovio, qui Orationem, et caput, [*Orat. pro Balbo cap. 6*] unde locus iste petitus est, accurate indicavit: magno me onere levaturus, si quod hec, et in sequenti ac paucissimis aliis locis fecit, ubique, ut poterat, experiri voluisset. *J. B.*

PRELIMINARY REMARKS.

1 THE Civil Law, both that of Rome, and that of each nation in particular, has been treated of, with a view either to illustrate it or to present it in a compendious form, by many. But International Law, that which regards the mutual relations of several Peoples, or Rulers of Peoples, whether it proceed from nature, or be instituted by divine command, or introduced by custom and tacit compact, has been touched on by few, and has been by no one treated as a whole in an orderly manner. And yet that this be done, concerns the human race.

2 For rightly did Cicero call that an excellent science which includes the alliances, treaties, and covenants of peoples, kings, and

Euripides hanc scientiam rerum divinarum et humanarum cognitioni præponit: ²sic enim Theonoe compellari facit:

Nam turpe id esset, cum scias hominum ac Deum
Quod est eritque, iusta te haud cognoscere.

Nullum quibusdam, nisi utile.

3 Atque eo magis necessaria est hæc opera, quod et nostro sæculo non desunt et olim non defuerunt qui hanc juris partem ita contemnerent quasi nihil ejus præter inane nomen existeret. In omnium ferme ore est Euphemi dictum ^aapud Thucydidem, regi aut civitati imperium habenti nihil injustum quod utile: cui simile illud, in summa fortuna id æquius quod validius; et rempublicam sine injuria geri non posse. Accedit, quod quæ inter populos aut reges incidunt controversiæ ferme Martem habent arbitrum. Est autem non vulgi tantum hæc opinio, bellum ab omni jure abesse longissime, sed et

^a Non præponit, sed conjungendam esse statuit, ut statim cuius versionem Auctoris nostri, quæ fida est non minus quam elegans, inspicienti patebit. Id autem quam maxime ab omni ævo neglectum fuisse, in nostra ad PUFENDORFIUM *De Jure Nat. et Gent.* Præfatione Gallica, fuse probavimus. J. B.

^a *Apud Thucydidem*] Verba sunt Lib. vi. Ἀνὴρ δὲ τυράννης ἢ πόλις ἀρχὴν ἐχούσῃ οὐδὲν ἄλογον, ὅ, τι ξυμφέρει. (Cap. 85. Edit. Ozon.) Idem sensus libro v. ubi Athenienses præponentes eo tempore sic Melios alloquun-

tur: ὅτι δίκαια μὲν ἐν τῷ ἀνθρωπείῳ λόγῳ ἀπὸ τῆς ἰσῆς ἀνάγκης κρίνεται. δυνατὰ δὲ οἱ δυνατοὶ πράσσουνσι, καὶ οἱ ἀσθενεῖς συγχωροῦσι· *juxta humanæ rationi ea censei, quæ par necessitas indicit: ceterum quæ fieri possunt, ea fieri a validioribus, ab infirmioribus tolerari.* (cap. 89.) [In primo loco non agitur de comparatione *justi* cum *utili*, sed de *utili* tantum. Vide notas nostras Gall. J. B.]

^b *A se posse exaudiri*] Apud Plutarchum Lysander machinam ostendens: ὁ ταύτης κρατῶν βέλτιστα

nations, and all the rights of war and peace. And Euripides prefers this science to the knowledge of things human and divine; for he makes Helen address Theonoe thus:

'twould be a base reproach
That you, who know th' affairs of gods and men
Present and future, know not what is just.

3 And such a work is the more necessary on this account; that there are not wanting persons in our own time, and there have been also in former times persons, who have despised what has been done in this province of jurisprudence, so far as to hold that no such thing existed, except as a mere name. Every one can quote the saying of Euphæmius in Thucydides;—that for a king or a city which has an empire to maintain, nothing is unjust which is useful: and to the same effect is the saying, that for those who have supreme power, the equity is where the strength is: and that other, that state affairs cannot be carried on without doing some wrong. To this we must

viris doctis ac prudentibus sæpe dicta excidunt, quæ talem opinionem foveant. Nihil enim frequentius, quam opposita inter se, jus et arma. Nam et Ennius dixit:

Non ex jure manu consertum, sed mage ferro
Rem repetunt.

Et Horatius ferociam Achillis sic describit:

Jura negat sibi nata, nihil non arrogat armis:

et alius alium, cum bellum ordiretur, sic loquentem inducit:

Hic pacem temerataque jura relinquo.

Antigonus senex irrisit hominem, qui sibi urbes alienas oppugnant commentarium de justitia adferebat. Et Marius negabat præ armorum strepitu leges^a a se posse exaudiri. Ipse ille oris tam verecundi Pompeius ausus est dicere: *c Armatus*³ *leges ut cogitem?*

Art. Poet.
v. 122.

[[Lucan.
Phars. l.
225]].

[[Plutarch.
de fortit.
Alexandri
p. 330.]]
[[Idem
Apophth. p.
312. Valer.
Maxim. v.
ii. 8.]]

περὶ γῆς ὅρων διαλέγεσθαι. Hanc qui habet, is optime de terrarum finibus disputat. Apophthegm. (p. 190 E.). Apud eundem Cæsar: οὐ τὸν αὐτὸν ὅρων καὶ νόμων καιρὸν εἶναι. Non idem esse tempus armorum quod legum. (Vit. Cæs. p. 725 B.). Seneca quarto de Beneficiis capite xxxvii. Multa interim reges, in bello præsertim, opertis oculis donant: non sufficit homo justus unus tot armatis cupiditatibus: non potest quisquam eodem tempore et bonum virum et bonum ducem agere.

^c *Armatus leges ut cogitem?* Plu-

tarchus hanc sententiam Pompeii ad Mamertinos sic enuntiat: οὐ παύσεσθε ἡμῖν ὑπεζωσμένοις ξίφη νόμους ἀναγινώσκοντες; Non desinetis nobis hominibus gladiis accinctis leges recitare? (Vit. Pomp. p. 623 D.). Curtius Lib. ix: Adeo etiam naturæ jura bellum in contrarium vertit. (Cap. 4.)

³ Verba ita concepta, quæ postea, ut refert Plutarchus, Auctor in Nota sua posuit, habuerat ille ex ALBERICO GENTILI, *De Armis Romanis*, Lib. i. c. 10. pag. 62. Ed. Hanov. 1612. J. B.

add that the controversies which arise between peoples and kings have commonly war for their arbiter. And that war is far from having anything to do with rights, is not only the opinion of the vulgar, but even learned and prudent men often let fall expressions which favour such an opinion. It is very usual to put *rights* and *arms* in opposition to each other. And accordingly Ennius says:

They have recourse to arms, and not to rights.

And Horace describes Achilles thus:

Rights he spurns

As things not made for him, claims all by arms.

And another poet introduces a warrior, who when he enters on war, says:

Now, Peace and Law, I bid you both farewell.

Antigonus laughed at a man, who, when he was besieging his enemies' cities, brought to him a Dissertation on Justice. And Marius said that the din of arms prevented his hearing the laws. Even Pompey,

4 In Christianis scriptoribus plurima ejus sensus occurrunt: pro multis unum 'Tertulliani sufficiat: *dolus, asperitas, injustitia, propria negotia praeliorum*. Qui ita sentiunt, dubium non est, quin opposituri sint nobis illud ex comoedia:

[Terent.
Eunuch. i.
1.]

Incerta hæc si tu postules
Ratione certa facere, nihilo plus agas,
Quam si des operam, ut cum ratione insanias.

*Jus esse
assertum,
contra Car-
neadis objec-
tiones.*

5 Cum vero frustra de jure suscipiatur disputatio, si ipsum jus nullum, et ad commendandum, et ad præmuniendum opus nostrum pertinebit, hunc gravissimum errorem breviter refelli. Ceterum ne cum turba nobis res sit, demus oī advocatum. Et quem potius quam Carneadem, qui ad id pervenerat, quod academix suæ summum erat, ut pro falso non minus quam pro vero vires eloquentiæ posset intendere? Is ergo cum suscepisset justitiæ, hujus præcipue de qua nunc agimus, oppugnationem, nullum invenit argumentum validius isto: jura

Apud Lac-
tant. v. 16.

4 Locus est Lib. *Adversus Judæos*,
cap. 9. *J. B.*

4 Οικείωσιν Stoici appellabant]
Chrysostomus *ad Romanos* Homilia
xxi. [Immo Homil. iv. in cap. 1. vers.
31.] ἔχομεν γὰρ φυσικὴν τινα πρὸς

ἄλλῃλους οικείωσιν, ἣν καὶ θηρία πρὸς
ἄλλα κέκτηνται. *Habemus natura
homines cum hominibus societatem:
quidni, cum tale quid inter se et feræ
habeant? Vide eundem capite primo
ad Ephesios*, ubi a natura nobis data do-

who was so modest that he blushed when he had to speak in public, had the face to say, *Am I who am in arms to think of the laws?*

4 In Christian writers many passages of a like sense occur: let that one of Tertullian suffice for all: *Deceit, cruelty, injustice, are the proper business of battles*. They who hold this opinion will undoubtedly meet our purpose, [of establishing the Rights of War,] with the expressions in Terence:

You that attempt to fix by certain Rules
Things so uncertain, may with like success
Contrive a way of going mad by reason.

5 But since our discussion of Rights is worthless if there are no Rights, it will serve both to recommend our work, and to protect it from objections, if we refute briefly this very grave error. And that we may not have to deal with a mob of opponents, let us appoint them an advocate to speak for them. And who can we select for this office, fitter than Carneades, who had made such wonderful progress in his suspension of opinion, the supreme aim of his Academical Philosophy, that he could work the machinery of his eloquence for falsehood as easily as for truth. He, then, undertook to argue against justice; and especially the kind of justice of which we here treat; and in doing so, he found no argument stronger than this:—

sibi homines pro utilitate sanxisse, varia pro moribus, et apud eosdem pro temporibus sæpe mutata: jus autem naturale esse nullum: omnes enim et homines et alias animantes ad utilitates suas natura ducente ferri: proinde aut nullam esse justitiam, aut si sit aliqua, summam esse stultitiam, quoniam sibi noceat alienis commodis consulens.

6 Verum quod hic dicit philosophus, et sequitur poëta: [Horat. I. Sat. iii. 113.]

Nec natura potest justo secernere iniquum:

1. *Naturale.*

admitti omnino non debet: nam homo animans quidem est, sed eximium animans, multoque longius distans a ceteris omnibus, quam ceterorum genera inter se distant: cui rei testimonium perhibent multæ actiones humani generis propriæ. Inter hæc autem, quæ homini sunt propria, est appetitus societatis, id est communitatis non qualiscunque sed tranquillæ, et pro sui intellectus modo ordinatæ, cum his qui sui sunt generis: quam ^d*οικείωσιν* Stoici ^sappellabant. Quod ergo dicitur natura

cet ad virtutem semina. Marcus Antoninus Imperator summe philosophus: *ὅτι γὰρ πρὸς κοινωνίαν γυγόμεναι, παλαι δέδωκται. ἢ οὐκ ἦν ἐναργὲς, ὅτι τὰ χεῖρα τῶν κρείττωνων ἔνεκεν, τὰ δὲ κρείττω τῶν ἀλλήλων. Πρίδὲμ παύει*

ad societatem nos genitos. Nonne in aperto est deteriora esse meliorum causa, meliora vero alterum alterius causa? Lib. v. § 16. Edit. Gatak.

^s Auctor, in Nota sua, testem tantum adfert Chrysostomum vocis *οικεί-*

that men had, as utility prompted, established Rights, different as their manners differed; and even in the same society, often changed with the change of times: but Natural Law there is none: for all creatures, men and animals alike, are impelled by nature to seek their own gratification: and thus, either there is no such thing as justice, or if it exist, it is the height of folly, since it does harm to itself in aiming at the good of others.

6 But what the philosopher here says, and what the poet (Horace) follows:—

By naked nature ne'er was understood

What's just and right:

must by no means be admitted. For man is an animal indeed, but an animal of an excellent kind, differing much more from all other tribes of animals than they differ from one another; which appears by the evidence of many actions peculiar to the human species. And among these properties which are peculiar to man, is a desire for society; that is, a desire for a life spent in common with fellow-men; and not merely spent somehow, but spent tranquilly, and in a manner corresponding to the character of his intellect. This desire the Stoics called *οικείωσις*, the domestic instinct, or feeling of kindred.

quodque animal ad suas tantum utilitates ferri, ita universe sumtum concedi non debet.

7 Nam et ceterarum animantium quædam utilitatum suarum studium, partim fœtum suorum, partim aliorum aibi congenerum respectu aliquatenus temperant: quod in illis quidem procedere credimus ex principio aliquo intelligente extrinseco, quia circa actus alios, istis neutiquam difficiliore, par intelligentia in illis non apparet. Idemque de infantibus dicendum, in quibus ante omnem disciplinam ostendit se ad

ωοις hoc sensu usurpatæ. Sed reperitur illa, ut et verbum ολκείονθαί, apud PLUTARCHUM, *De Stoicorum repugnantia*, pag. 1038 B, c. Tom. II. *Ed. Wech.* Adde PORPHYRIUM, *De non esu Animal.* Lib. I. pag. 13. *Ed. Lugd.* 1620. Lib. III. pag. 294. 328. &c. qui et voce ολκείονθης alibi eadem in re utitur, loco ab Auctore nostro infra laudando, Lib. II. c. 20. § 9. num. 3. in not. Omnia autem illa videntur fluxisse ex eo quod ARISTOTELES ait, ως ολκείον άπας άνθρωπος άνθρωπῳ καί φίλῳ. *Ethic. Nicom.* Lib. VIII. c. 1. *J. B.*

* Aliquatenus temperant] Vetus est proverbium, canis caninam non est. *Juvenalis.* (*Sat.* xv. 161):

Indica tigris agit rabida cum tigride pacem:

Parcit

Cognatis maculis similis fera.

Est locus Philonis egregius ad decalogi præceptum quintum, quem græce qui volet legat. Ego eum, quia longior est, semel, id est, latine hic ponam: *Imitatores saltem mutorum animantium*

estote, homines. Beneficio vicem rependere illa edocta norunt. Canes domus defensores sunt: quin et pro heris moriuntur, si quod subito periculum eos contigerit. Dicuntur et canum illi qui greges comitantur præcedere pecora, depugnantes ad mortem usque, ut pastores illasos præstent. Nonne inter fæda fœdissimum est, in referenda gratia vinci hominem a cane, mitissimum animal a ferocissimo? quod si a terrestribus non satis edocemur, transeamus ad naturam volucrum, aëris viatricem, ut vel inde discamus, quod oportet. Ciconiarum senes in nidis manent, volare invalide. Harum soboles per omnes, prope sic dixerim, terras mariaque volitant, victum undique parentibus quærentes: illæ pro ætatis merito fruuntur quiete, rerum copia, deliciis etiam: hæ vero itineris molestias solantur pietatis conscientia et expectatione parvis olim, ubi senuerint, a sua prole, atque ita legitimo tempore debitum persolvunt necessarium, quod accipere reddentes. Neque enim

And therefore the assertion, that, by nature, every animal is impelled only to seek its own advantage or good, if stated so generally as to include man, cannot be conceded.

7 And indeed even in other animals, as well as in man, their desire of their own individual good is tempered by a regard, partly for their offspring, partly for others of their own species; which in them, indeed, we perceive to proceed from some extrinsic intelligent principle*; because with regard to other acts not at all

* In his *Treatise De Veritate Rel. Christ.* Lib. I. 7, Grotius notices the acts of animals, (as ants and bees,) which appear to proceed from some extrinsic Reason; quæ quidem Ratio non aliud est quam quod Deus vocatur. W.

bene aliis faciendum propensio quædam, prudenter a Plutarcho ⁶observata: sicut et in ea ætate misericordia sponte prorumpit. Homini vero perfectæ ætatis, cum circa similia similiter agere norit, cum societatis appetitu excellente, cujus peculiare solus inter animantes instrumentum habet sermonem, inesse etiam facultatem sciendi agendique, secundum generalia præcepta, par est intelligi, cui quæ conveniunt ea jam sunt non omnium quidem animantium, sed humanæ naturæ congruentia.

ab aliis alimenta habere possunt, aut initio vitæ parvæ cum sunt, aut natu grandes in vitæ exitu: quapropter non alio quam natura magistro didicerunt educare vetulas, educatas et ipsæ cum teneræ essent. Nonne vero hæc ubi audiunt, habent cur se præ pudore abscondant, qui parentum curam non habent, atque eos negligunt, quos aut solos aut præ ceteris sublevare debuerant, præsertim cum id facientes non tam daturi sint quippiam, quam id quod debent redditori? Nihil enim est liberis proprium quod non parentum sit prius, qui aut de suo dederunt, aut acquirendi præbuerunt causas. (Pag. 760, 761, *Ed. Paris.*) De columbarum cura eximia circa festus suos vide Porphyrium de non esu animalium tertio. (Pag. 315.) De scarorum et saurorum pro sociis Cassiodorum xi. 40.

⁶ Videtur Auctor respicere hæc, quod ait PLUTARCHUS in *Consolat. ad Uzorem*, pag. 608 D. quod tamen potius contrarium innuit, quum ab ea propen-

sione ad benefaciendum, tamquam singulari, commendet filiolam suam in infantia mortuam. De re ipsa diximus in Gallicis nostris Notis uberioribus. J. B.

[Cum societatis appetitu eccellente] M. Antoninus libro ix. ὁ ἀνθρώπος εὐεργετικὸν πέφυκε. Homo in id natus est, bene ut aliis faciat. (§ 42.) Item: θάσσον γούν εἰσοί τις ἂν γεῶδες τι μηδενὸς γεῶδους προσαπτόμενον, ἢ περ ἀνθρώπου ἀνθρώπου διασχιζόμενον. Facilius reperiat quis terrestre aliquid ad terram se non ferens, quam hominem ab humano genere abscissum. (§ 9.) Libro x. ἐστὶ τὸ λογικὸν εὐδὲς καὶ πολιτικόν. quod ratione utitur, necessario et cætum appetit. (§ 2.) Nicetas Choniates: ἐνεσημήνατό πως ἡ φύσις ἡμῶν καὶ ἐνεφύτευσσε πρὸς τὰ οἰκεῖα συμπάθειαν. Natura insculpsit inveniitque nobis animo consensionem cum iis, quæ cognata sunt nobis. (In Isaac. Angel. L. III. c. 9.) Adde Augustinum de *Doctrina Christiana* Lib. III. c. 14.

more difficult than those [thus directed towards the offspring, and the like,] an equal degree of intelligence does not appear. The same is to be said of infants, in which, previous to all teaching, we see a certain disposition to do good to others, as is sagaciously remarked by Plutarch: as for example, compassion breaks out spontaneously at that age. But inasmuch as a man of full age has the knowledge which enables him to act similarly in similar cases; and along with that, a peculiar and admirable appetite for society; and has also language, an instrument of this desire, given to him alone of all animals; it is reasonable to assume that he has a faculty of knowing and acting according to general principles; and such tendencies as agree with this faculty do not belong to all animals, but are peculiar attributes of human nature.

*Homini proprium sociale: proprie et strio-
le dictum.*

8 Hæc vero, quam rudi modo jam expressimus, ⁶societatis custodia, ⁷humano intellectui conveniens, fons est ejus juris, quod proprie tali nomine appellatur: ⁸quo pertinent alieni abstinentia, et si quid alieni habeamus aut lucri inde fecerimus restitutio, promissorum implendorum obligatio, damni culpa dati reparatio, et pœnæ inter homines meritum.

9 Ab hac juris significatione fluxit altera largior: quia enim homo supra ceteras animantes non tantum vim obtinet socialem, de qua diximus, sed et judicium ad æstimanda quæ delectant aut nocent, ⁹non præsentia tantum, sed et futura, et quæ in utrumvis possunt ducere; pro humani intellectus modo

6 Societatis custodia humano intellectui conveniens] Seneca iv. de Beneficiis, cap. xviii. Ut scias per se expectandam esse grati animi affectionem, per se fugienda res est, ingratum esse, quoniam nihil æque concordiam humani generis dissociat ac distrahit, quam hoc vitium. Nam quo alio tuti sumus, quam quod mutuis juvamus officiis? hoc uno instructor vita, contraque incursiones subitas munitior est, beneficiorum commercio. Fae nos singulos, quid sumus? præda animalium et victimæ ac vilissimus et facillimus sanguis: quoniam ceteris animalibus in tutelam sui satis virium est. Quæcumque vaga nascuntur, et actura vitam segregem, armata sunt: hominem imbecillitas cingit: non unguis vis, non dentium, terribilem ce-

teris facit: duas res dedit, quæ illum, obnoxium ceteris, validissimum facerent, rationem et societatem: itaque qui par esse nulli posset si diduceretur, rerum potitur. Societas illi dominium omnium animalium dedit: Societas terris genitum in alienæ naturæ transmisit imperium, et dominari etiam in mari jussit. Hæc morborum impetus arcuit, senectuti adminicula prospexit, solatia contra dolores dedit: hæc fortes nos facit, quod licet contra fortunam advocare. Hanc tolle, et unitatem generis humani, qua vita sustinetur, scindes. Tollitur autem, si efficias ut ingratus animus non per se vitandus sit.

⁷ Vide PUFENDORPIUM nostrum *De Jure Nat. et Gent.* Lib. II. cap. 3. ubi fuse principium istud adstruit et ex-

8 And this tendency to the conservation of society, which we have now expressed in a rude manner, and which tendency is in agreement with the nature of the human intellect, is the source of *Jus*, or Natural Law, properly so called. To this *Jus* belong the rule of abstaining from that which belongs to other persons; and if we have in our possession anything of another's, the restitution of it, or of any gain which we have made from it; the fulfilling of promises, and the reparation of damage done by fault; and the recognition of certain things as meriting punishment among men.

9 From this signification has flowed another larger sense of *Jus*: for, inasmuch as man is superior to other animals, not only in the social impulse of which we have spoken, but in his judgment and power of estimating advantages and disadvantages; and in these, not only present good and ill, but also future good and ill, and what may lead to each; we may understand that it is congruous to human

etiam in his iudicium recte conformatum sequi, neque metu, aut voluptatis præsens illecebra corrumpi, aut temerario rapi impetu, conveniens esse humanæ naturæ; et quod tali iudicio plane repugnat, etiam contra jus naturæ, humanæ scilicet, esse intelligitur.

10 Atque huc etiam pertinet in his quæ cuique homini aut cœtui propria sunt elargiendis ^{Improperie et laxius.} prudens dispensatio, ut quæ nunc sapientiore minus sapienti, nunc propinquum extraneo, nunc pauperem diviti, prout actus cujusque et rei natura fert, præponit: quam juris proprie stricteque dicti partem jam olim multi faciunt, cum tamen jus illud proprie

ponitur. *J. B.*

^b *Quo pertinent alieni abstinencia*] Porphyrius de non esu animantium tertio: ἡ δὲ δικαιοσύνη ἐν τῷ ἀφλεκτικῷ καὶ ἀβλαβεὶ κεῖται παντὸς ὄντος τοῦ μὴ βλάπτουτος. *Justitia in eo sita est, ut abstinence alienis, neque nocetur non nocentibus.* (Pag. 329.)

^c Ita quidem habent omnes Editiones: sed, quamquam sensus Auctoris ex serie orationis satis pateat, loquutio non satis est adcurata. Neque enim τὸ nocent recte opponitur τῷ delectant: nisi dicas, quidquid delectat, id prodesse; quod a mente Auctoris et rei veritate plane alienum est. Aut heic est ἀκρολογία, aut possit quis suspicari Auctorem voluisse scribere: quæ

delectant AUT DOLOREM CREANT, QUÆ JUVANT aut nocent: voces autem intermedias, sive ex ipsius Auctoris lapsu calami, sive ex incogitantia Exscriptorum, excidisse, adeo ut neque postea Auctor, rebus magis quam verbis intentus, id animadverterit, quemadmodum alibi non semel accidisse nobis comperitum est. Ceterum res ipsa pertinet ad officia Hominis erga se ipsum, de quibus fuse PUFENDORFIUS, *De Jur. Nat. et Gent.* Lib. II. c. 4. *J. B.*

^d *Prudens dispensatio, ut quæ nunc sapientiore minus sapienti, nunc propinquum extraneo, nunc pauperem diviti, prout actus cujusque et rei natura fert, præponit*] Agit hac de re Ambrosius libro primo *de Officiis.* (Cap. 80.)

nature to follow, in such matters also, [the estimate of future good and ill, and of the consequences of actions,] a judgment rightly framed; not to be misled by fear or by the temptation of present pleasure, nor to be carried away by blind and thoughtless impulse; and that what is plainly repugnant to such judgment, is also contrary to *Jus*, that is, to Natural Human Law.

10 And to this exercise of judgment pertains a reasonable and thoughtful assignment, to each individual and each body of men, of the things which peculiarly belong to them; by which exercise of judgment in some cases, the wiser man is preferred to the less wise; in others, our neighbour to a stranger; in others, a poor man to a rich man; according as the nature of each act and each thing requires. And this some persons have treated as a part of *Jus* properly and strictly so called; although *Jus* properly so called is really very different in its nature, and has this for its special office; to leave to another what is his, to give to him what we owe.

nominatum diversam longe naturam habeat, in eo positam, ut quæ jam sunt alterius alteri permittantur, aut ⁹impleantur.

11 Et hæc quidem quæ jam diximus, locum aliquem haberent, etiamsi daremus, ¹quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana: cujus contrarium cum nobis partim ratio, partim traditio perpetua inseverint; confirment vero et argumenta multa et miracula ab omnibus sæculis testata, sequitur, jam ipsi Deo, ut opifici et cui nos nostraque omnia debeamus, sine exceptione parendum nobis esse, præcipue cum is se multis modis et optimum et potentissimum ostenderit; ita ut sibi obedientibus præmia reddere maxima, etiam æterna, quippe æternus ipse, possit, et voluisse credi debeat, multoque magis si id disertis verbis promiserit: quod Christiani indubitata testimoniorum fide convicti credimus.

⁹ Nihil heic volui mutare: sed, quamquam ita in omnibus Editionibus legatur, vix dubito quin Auctor scripserit: *aut quæ ALTERI DEBENTUR impleantur*: neque enim, secundum Auctorem nostrum, ea quæ *implentur*, jam *erant alterius*, erga quem implentur, sed tantum ei *debentur*, tum demum illius futura, quando impleta fuerint. Vide infra Lib. II. c. 7. num. 1. et Lib. III. c. 19. n. 15. *J. B.*

¹ Vide, quæ observavimus in PUFENDORFII nostrum, *De Jur. Nat. et*

Gent. Lib. II. c. 3. § 19. not. 2. et quæ infra monemus, ad Lib. I. c. 1. § 8, [immo 10] num. 2. not. 4. J. B.

¹ *Ex libera Dei voluntate*] Inde M. Antonino iudice libro IX: *ὁ δδικῶν δσεβεῖ· qui injuste agit, impius est.* [Locus est § 1. Sed ibi agitur de jure Naturali, non de *Jure Divino voluntario*, qui ex *libera Dei voluntate* venit. Plura diximus in Gallicis Notis. *J. B.*]

¹ *Deo tamen adscribi merito potest*] Chrysostomus I. ad Corinthios XI. 3: *ὁταν δὲ εἴπω τὴν φύσιν, θεὸν λέγω. δ*

11 And what we have said would still have great weight, even if we were to grant, what we cannot grant without wickedness, that there is no God, or that he bestows no regard on human affairs. But inasmuch as we are assured of the contrary of this, partly by reason, partly by constant tradition, confirmed by many arguments and by miracles attested by all ages, it follows that God, as the author of our being, to whom we owe ourselves and all that we have, is to be obeyed by us without exception, especially since he has, in many ways, shewn himself both supremely good and supremely powerful: wherefore he is able to bestow upon those who obey him the highest rewards, even eternal ones, as being himself eternal; and he must be supposed to be willing as well as able to do this; and the more so, if he have promised such rewards in plain language; which we Christians believe, resting our belief on the indubitable faith of testimonies.

12 And here we are brought to another origin of Jus, besides

12 Et hæc jam alia juris origo est præter illam naturalem, veniens scilicet ¹ex libera Dei voluntate, cui nos subijci debere intellectus ipse noster nobis irrefragabiliter dictat. Sed et illud ipsum de quo egimus naturale jus, sive illud sociale, sive quod laxius ita dicitur, quamquam ex principiis homini internis profuit, ¹Deo tamen adscribi merito potest, quia ut talia principia in nobis existerent ipse voluit: quo sensu Chrysippus et Stoici dicebant, juris originem non aliunde petendam quam ab ipso Jove, ^ma quo Jovis nomine jus Latinis dictum probabiliter dici potest.

13 Accedit, quod illa quoque ipsa principia Deus datis legibus magis conspicua fecit, etiam iis quibus imbecillior est ad ratiocinandum vis animi: et in diversa trahentes impetus, qui nobis ipsis, quique aliis male ²consultunt, vagari vetuit,

γὰρ τὸν φύσιν δημιουργήσας αὐτὸς ἐστίν. Cum naturam dico, Deum dico; ipse enim est naturæ opifex. [Tom. III. pag. 410. Edit. Eton. Savil.] Chrysippus III. de Diis: οὐ γὰρ ἐστὶν εὐρεῖν τῆς δικαιοσύνης ἄλλην ἀρχὴν οὐδὲ ἄλλην γένεσιν, ἢ τὴν ἐκ τοῦ Διὸς καὶ τὴν ἐκ τῆς κοινῆς φύσεως. ἐντεῦθεν γὰρ δεῖ πᾶν τὸ τοιοῦτον τὴν ἀρχὴν ἔχειν, εἰ μέλλομέν τι εἰρεῖν περὶ ἀγαθῶν καὶ κακῶν. Non potest inveniri principium aliud aut origo justitiæ, quam ab Jove et communi natura: inde enim initium duci debet, ubi de bonis

malisque disserendum est. [Apud PLUTARCH. de Stoic. rep. pag. 1035.]

^m A quo Jovis nomine jus latinis dictum] Nisi forte verius per abscissionem, ut ex eo quod fuit *ossum* factum est *os*, ita ex eo quod fuerat *jussum* factum *jus*, *justis*, postea *juris*, ut ex *Papiriis Papirii*, de quo vide Cicero-nem Lib. IX. epist. 21.

² Vocem illam *male*, quæ excidit in omnibus Editionibus, fidenter addidi. Illam deesse, adeo ut aliter Auctoris sententia non constet, res ipsa clamat. Si enim τὸ *consultunt* in bonam partem

that natural source; namely, the free will of God, to which, as our reason irresistibly tells us, we are bound to submit ourselves. But even that Natural Law of which we have spoken, whether it be that which binds together communities, or that looser kind [which enjoins duties,] although it do proceed from the internal principles of man, may yet be rightly ascribed to God; because it was by His will that such principles came to exist in us. And in this sense, Chrysippus and the Stoics said that the origin of *Jus* or Natural Law was not to be sought in any other quarter than in Jove himself; and it may be probably conjectured that the Latins took the word *Jus* from the name *Jove*.

13 To this we must add, that these principles God has made more manifest by the laws which he has given, so that they may be understood by those whose minds have a feebler power of drawing inferences: and he has prohibited the perverse aberrations of our affections which draw us this way and that, contrary to our own interest

illos quippe vehementiores adductius regens et fine ac modo coercens.

1. ut vim.
3. D. de Just.
et Jur.

14 Sed et historia sacra præter id, quod in præceptis consistit, affectum illum socialem non parum etiam eo excitat, quod nos docet ab iisdem primis parentibus ortos homines omnes, ita ut eo quoque sensu dici recte possit quod alio dixit Florentinus, cognationem inter nos a natura constitutam; cui consequens sit, hominem homini insidiari nefas esse. Inter homines quasi ²Dii quidam sunt parentes, quibus proinde non infinitum sed sui generis obsequium debetur.

2. Humanum.

Civile cuius-
que civitatis.

15 Deinde vero, cum juris naturæ sit stare pactis, (necessarius enim erat inter homines aliquis se obligandi modus, neque vero alius modus naturalis fingi potest,) ab hoc ipso fonte jura civilia fluxerunt. Nam qui se cœtui alicui aggregaverant, aut homini hominibusque subjecerant, hi aut expresse

sumas, ut omnino sumendum, quando nihil aliud additur (vide exemplum infra, Lib. III. c. 20. § 51.) tunc utiles esse, et nobis, et aliis, impetus illos in alia trahentes, quam quo ducit Ratio et Lex Naturæ, Auctor noster dicet; quod quam alienum sit a mente ipsius, nemo non intelligit. Vix autem dubito, quin propter similitudinem vocis aliis cum

sequenti male, hæc omissa fuerit vel ab exscriptore, vel a typographo: et ejus rei exempla alibi videbimus. J. B.

² Dii quidam sunt parentes] Θεοὶ ἐπίγειοι Hierocli ad aureum carmen, Dii terrestres: Philoni ad Decalogum ἐμφανεῖς Θεοὶ, μιμούμενοι τὸν ἀγέννητον ἐν τῷ ἡρώδου τῷ βασιλεὶς· conspicui Dii, qui ingenitum Deum imitantur vi-

and the good of others; putting a bridle upon our more vehement passions, controlling and restraining them within due limits.

14 Further. The Sacred History, besides that part which consists in precepts, offers another view which in no small degree excites the social affection of which we have spoken; in that it teaches us that all men are sprung from the same parents. And thus we may rightly say, in this sense also, what Florentinus says in another sense, that there is a kindred established among us by nature: and in virtue of this relation it is wrong for man to intend mischief towards man.

Among men [all are not on the same footing towards us: as for instance,] our parents are a sort of Gods to us, to whom obedience is due; not infinite indeed, but an obedience of its own proper kind.

15 In the next place, since it is conformable to Natural Law to observe compacts, (for some mode of obliging themselves was necessary among men, and no other natural mode could be imagined,) Civil Rights were derived from this source, mutual compact. For those who had joined any community, or put themselves in subjection

promiserant, aut ex negotii natura tacite promisisse debebant intelligi, secuturos se id quod aut cœtus pars major, aut hi, quibus delata potestas erat, constituissent.

16 Quod ergo dicitur non Carneadi tantum, sed et aliis,

• *Utilitas justî prope mater et æqui,*

si accurate loquamur, verum non est: nam naturalis juris mater est ipsa humana naturâ, quæ nos, etiamsi re nulla indigeremus, ad societatem mutuam appetendam ferret: civilis vero juris mater est ipsa ex consensu obligatio, quæ cum ex naturali jure vim suam habeat, potest natura hujus quoque juris quasi proavia dici. Sed naturali juri utilitas accedit: voluit enim naturæ Auctor nos singulos et infirmos esse, et multarum rerum ad vitam recte ducendam egentes, quo magis ad colendam societatem raperemur: juri autem civili occasio-

iam dando. (Pag. 761 D.) secunda post Deumfœderatio Hieronymo epist. XLVII. (Tom. I. pag. 224 D. Edit. Basil.) Parentes Deorum simulacra Platoni de legibus XI. (Pag. 930, 931. Tom. II. Ed. H. Steph.) Honos parentibus ut Diis debetur, pronuntians Aristotele *Nicomacheorum* IX. cap. 11. [Locus HIEROCLEIS non est e Comment. in *Aurea Carm.* sed reperitur apud STOB.

Serm. 77. J. B.]

• *Utilitas justî prope mater et æqui*] Ad quem locum *Acron*, aut quisquis est vetus Horatii interpres: *repugnat præceptis Stoicorum: ostendere vult justitiam non esse naturalem, sed natam ex utilitate.* Contra hanc sententiam vide quas disputat Augustinus *de Doctrina Christiana* Libro III. c. XIV.

to any man or men, those either expressly promised, or from the nature of the case must have been understood to promise tacitly, that they would conform to that which either the majority of the community, or those to whom the power was assigned, should determine.

16 And therefore what Carneades said (as above), and what others also have said, as Horace,

Utility, Mother of just and right.

if we are to speak accurately, is not true. For the Mother of Right, that is, of Natural Law, is Human Nature; for this would lead us to desire mutual society, even if it were not required for the supply of other wants; and the Mother of Civil Laws, is Obligation by mutual compact; and since mutual compact derives its force from Natural Law, Nature may be said to be the Grandmother of Civil Laws. [The genealogy is, Human Nature: Natural Law: Civil Laws.] But Natural Law, [which impels us to society,] is reinforced by Utility. For the Author of Nature ordained that we should, as individuals, be weak, and in need of many things to make life comfortable, in order that we might be the more impelled to cling to society. But

nem dedit utilitas: nam illa quam diximus consociatio, aut subjectio utilitatis alicujus causa cœpit institui. Deinde et qui jura præscribunt aliis, in eo utilitatem aliquam spectare solent, aut debent.

Gentium: civitatum omnium aut plerarumque.

17 Sed sicut cujusque civitatis jura utilitatem suæ civitatis respiciunt, ita inter civitates aut omnes, aut plerasque, ex consensu jura quædam nasci potuerunt, et nata apparet, quæ utilitatem respicerent non cœtum singulorum sed magnæ illius universitatis. Et hoc jus est quod gentium dicitur, quoties id nomen a jure naturali distinguimus: quam partem juris omisit Carneades, jus omne in naturale et civile singulorum populorum distribuens, cum tamen de eo jure quod inter populos versatur acturus, (subjecit enim orationem de bellis et bello partis) hujus juris mentionem facere omnino debuisset.

II.
Objectionum refutatio.

18 Male autem a Carneade stultitiæ nomine justitia tra-
ducitur. Nam sicut, ipso fatente, stultus non est civis, qui in

» *Sicut civis qui jus civile persum-
pit* Hac ipsa similitudine apposite uti-
tur Lib. ix. M. Antoninus: ἥτις ἐὰν
οὐκ πράξις σου μὴ ἔχῃ τὴν ἀναφορὰν,
εἴτε προσεχῶς εἴτε πόρρωθεν, ἐπὶ τὸ
κοινωνικὸν τέλος, αὕτη διαστὰ τὸν
βίον, καὶ οὐκ ἐξ ἑνὸς εἶναι, καὶ στα-
σιώδης ἐστίν, ὥσπερ ἐν δόμῳ ὃ τὸ καθ'

αὐτὸν μέρος διεισδύμενος. *Quæcumque
tua actio respectum non habebit sive
cominus sive eminus ad propositum com-
munitatis, ea vitam diducit, nec unam
esse patitur, seditiosaque non minus est
quam is qui in populo partem seorsim
facit. (§ 24.) Et libro xi: ἀνθρώπου
ἐνὸς ἀνθρώπου ἀποσχισθεὶς, οὐ δύναται*

Utility is the occasion of Civil Laws; for the association or subjection by mutual compact, of which we have just spoken (15), was at the first instituted for the sake of some utility. And accordingly, they who prescribe laws for others, in doing this, aim, or ought to aim, at some Utility, to be produced to them for whom they legislate.

17 Further: as the Laws of each Community regard the Utility of that Community, so also between different Communities, all or most, Laws might be established, and it appears that Laws have been established, which enjoined the Utility, not of special communities, but of that great aggregate System of Communities. And this is what is called the Law of Nations, or International Law; when we distinguish it from Natural Law. And this part of Law is omitted by Carneades, who divides all Law into Natural Law, and the Civil Laws of special peoples; while yet, inasmuch as he was about to treat of that Law which obtains between one people and another, (for then follows an oration concerning war and acquisitions by war,) he was especially called upon to make mention of Law of this kind.

18 And it is without any good reason that Carneades maintains,

civitate jus civile sequitur, etiamsi ob ejus juris reverentiam quædam sibi utilia omittere debeat: ita nec stultus est populus, qui non tanti facit suas utilitates, ut propterea communia populorum jura negligat; par enim in utroque est ratio. Nam sicut civis qui jus civile perrumpit utilitatis præsentis causa, id convellit quo ipsius posteritatisque suæ perpetuæ utilitates continentur: sic et populus jura naturæ gentiumque violans, suæ quoque tranquillitatis in posterum rescindit munimenta. Tum vero etiamsi ex juris observatione nulla spectaretur utilitas, sapientiæ non stultitiæ esset eo ferri, ad quod a natura nostra nos duci sentimus.

Justitia stultitia non est.

19 Quare nec illud,

Jura inventa metu injusti fateare necesse est:

quod apud Platonem quidam ita explicat, metu accipiendæ injuriæ repertas leges, ac vi quadam homines ad justitiam colendam adigi, universaliter verum est. Id enim ad ea dumtaxat instituta ac leges pertinet, quæ ad faciliorem juris

De Rep. Lib. II. p. 350 B. Tom. II. Gorg. p. 483. Tom. I. Vis ex metu injusti, et validioris, causa ejus non est.

μη καὶ ὅλον φόλου ἀποκεκόφθαι· *Hom. ab uno abscissus homine, non potest non et ab universo genere abscissus haberi.* (§ 8.) Nimirum, ut eidem Antonio dictum est, quod examini expedit, idem ap. [Locus ultimus exstat Lib. VI. § 84. In præcedenti autem, pro verbis illis, οὐ δύναται μη καὶ ὅλον φό-

λου ἀποκεκόφθαι, legitur: ὅλης τῆς κοινωνίας ἀποκέντωκε. Nimirum Auctor statim antea legerat: Κλάδος τοῦ προσεχούτε κλάδου ἀποκοπεῖται οὐ δύναται μη καὶ τοῦ ὅλου φυτοῦ ἀποκεκόφθαι· οὕτω δὲ καὶ ἄνθρωπος etc. Hæc igitur, memorie lapsu, confudit, simulque τὸ φυτοῦ in φόλου mutavit. J. B.]

as we have said (5), that justice is folly. For since, by his own confession, that Citizen is not foolish who in a Civil Community obeys the Civil Law, although, in consequence of such respect for the Law he may lose something which is useful to himself: so too that People is not foolish which does not so estimate its own utility, as, on account of that, to neglect the common Laws between People and People. The reason of the thing is the same in both cases. For as a citizen who violates the Civil Law for the sake of present utility, destroys that institution in which the perpetual utility of himself and his posterity is bound up; so too a people which violates the Laws of Nature and Nations, beats down the bulwark of its own tranquillity for future time. And even if no utility were to arise from the observation of Law, it would be a point, not of folly, but of wisdom, to which we feel ourselves drawn by nature.

19 And therefore neither is that other saying of Horace [1 Sat. iii.] universally true:

'Twas fear of wrong that made us make our laws;

an opinion which one of the interlocutors in Plato's *Republic* explains

exsecutionem reperta sunt; sicut multi per se infirmi, ne a validioribus opprimerentur, conspirarunt ad instituenda ac communibus viribus tuenda judicia, ut quibus singuli pares non erant, his universi praevalerent. Et hoc demum sensu commode accipi potest quod dicitur jus esse id quod validiori placuit; ut intelligamus fine suo externo carere jus, nisi vires ministras habeat; sicut Solon res confecit maximas, ut ipse prædicabat:

Apud
Plutarch. *Vit.*
Solon. p. 86 c.

‘Ομοῦ βίην τε καὶ δίκην συναρμόσας.

¶ Vim jusque parilis copulans vinculi jugo.

JUSTITIA
securitatem
adfert con-
scientiæ.

20 Neque tamen quamvis a vi destitutum jus omni caret effectu: nam justitia securitatem affert conscientiæ, injustitia tormenta ac laniatus, quales in tyrannorum pectoribus describit Plato. Justitiam probat, injustitiam damnat proborum consensus. Quod vero maximum est, hæc Deum inimicum, illa faventem habet, qui judicia sua ita post hanc vitam reservat, ut sæpe eorum vim etiam in hac vita repræsentet, quod multis exemplis historiæ docent.

[[Gorg. p. 594,
p. 595, Tom.
I.]]

¶ *Vim jusque parilis copulans vinculi jugo*] Ovidius:

Valet causa, causamque tuentibus armis.

[*Metam. Lib. VIII. vers. 59.* ubi tamen

melius Cl. Burmanni Editio verba hæc, *causamque tuentibus armis*, conjungit cum sequentibus: *Ut puto, vincemur.* J. B.]

in this way: that Laws were introduced from the fear of receiving wrong, and that men are driven to practise justice by a certain compulsion. For that applies to those institutions and laws only which were devised for the more easy maintenance of rights: as when many, individually feeble, fearing to be oppressed by those who were stronger, combined to establish judicial authorities, and to uphold them by their common strength; that those whom they could not resist singly, they might, united, control. And we may accept in this sense, and in no other, what is also said in Plato, that Right is that which the stronger party likes: namely, that we are to understand that Rights do not attain their external end, except they have force to back them. Thus Solon did great things, as he himself boasted,

By linking Force in the same yoke with Law.

20 But still Rights, even unsupported by force, are not destitute of all effect: for Justice, the observance of Rights, brings security to the conscience; while injustice inflicts on it tortures and wounds, such as Plato describes as assaulting the bosoms of tyrants. The conscience of honest men approves justice, condemns injustice. And what is the greatest point, injustice has for its enemy, justice, for its friend, God, who reserves his judgments for another life, yet in such a manner that he often exhibits their power in this life; of which we have many

21 Quod vero multi quam a civibus exigunt justitiam, eam in populo aut populi rectore insuper habeant, ejus erroris causa est, primum quod in jure nihil spectant nisi utilitatem quæ ex jure oritur, quæ evidens est in civibus, qui singuli ad sui tutelam invalidi sunt. At magnæ civitates, cum omnia in se complecti videantur quæ ad vitam recte tuendam sunt necessaria, opus habere non videntur ea virtute, quæ foras spectat et justitia appellatur.

Privatis populo, et populi rectoribus æque convenit.

[Aristoteles
Justitiam
dixit
ἐλλείπον
ἀνθρώπων
ἐν τῇ Νίκῃ.
Lib. v. c. 10.
J. B.]

22 Sed, ut ne repetam quod dixi, jus non solius utilitatis causa comparatum, nulla est tam valida civitas quæ non aliquando aliorum extra se ope indigere possit, vel ad commercia, vel etiam ad arcendas multarum externarum gentium junctas in se vires; unde etiam a potentissimis populis et regibus federa appeti videmus, quorum vis omnis tollitur ab his qui jus intra civitatis fines concludunt. Verissimum illud, omnia³ incerta esse simul a jure recessum est.

23 Si nulla est communitas quæ sine jure conservari possit, quod memorabili latronum exemplo probabat Aristo-

³ Verba sunt CICERONIS, ad *Familiæ*. Epist. xi. 16. quæ etiam ab Auctore nostro ei tribuantur in Nota sequenti. Ibi tamen, ut et in loco ex

Orat. pro Cæcina. quem Gronovius indicat, agitur tantum de Legibus Civilibus. J. B.

¹ Quod memorabili latronum exem-

examples in history.

21 The reason why many persons, while they require justice as necessary in private citizens, commit the error of thinking it superfluous in a People or the Ruler of a People, is this: in the first place, that in their regard to rights they look at nothing but the utility which arises from rights, which in the case of private citizens is evident, since they are separately too weak to protect themselves: while great States, which seem to embrace within them all that is requisite to support life in comfort, do not appear to have need of that virtue which regards extraneous parties, and is called justice.

22 But, not to repeat what I have already said, that Rights are not established for the sake of utility alone, there is no State so strong that it may not, at some time, need the aid of others external to itself: either in the way of commerce, or in order to repel the force of many foreign nations combined against it. And hence we see that Leagues of alliance are sought even by the most powerful Peoples and Kings; which can have no force according to the principles of those who confine rights within the boundary of the State alone. It is most true [as Cicero says,] that everything loses its certainty at once, if we give up the belief in rights.

23 If no society whatever can be preserved without the recognition

Polit. vii. 2.

Regis Pacem.

teles⁴: certe et illa quæ genus humanum aut populos complures inter se colligat, jure indiget: quod ille vidit qui⁵ dixit, fœda ne patriæ quidem causa facienda esse. ⁴Graviter eos accusat Aristoteles, qui cum inter se neminem velint imperare nisi qui jus habeat, in externos quid jus, quid injustum sit nihil curant.

plo probabat Aristoteles] Chrysostomus in caput iv. ad Ephesios: (Tom. iii. pag. 818. Edit. Savil.) *ὡς οὖν λησται εἰρηνεύουσι, φῆς. πότε; εἰπέ μοι. πάντως ὅταν οὐ ληστικῇ τρόπῃ χρῆσωνται. ἂν γὰρ ἐν αὐτοῖς οἷς ἂν διανέμονται, μὴ τοὺς νόμους φυλάξωσι τοὺς τοῦ δικαίου, καὶ ἐκάστῳ ἀπονέμωσι τὸ δίκαιον, εὐρήσει ἂν κακείνους ἐν πόλεμοις καὶ μάχαις.* *At qui fit ergo, dicit aliquis, ut in pace vivant latrones? Quando vero? dic quæso. Nempe cum non ut latrones agunt: nam si in dividendis rebus præscripta justitia non servant, neque partitionem ex æquo faciant, videbis et ipsos inter se bellis ac præliis implicari.* Plutarchus (Vit. Pyrrh. pag. 388 A.) cum Pyrrhi recitasset dictum, regnum se ei liberum suorum relinquere, cui acutissimus futurus esset gladius, dicit hoc nihil aliud esse quam quod in Phœnissis posuit Euripides,

(vers. 68):

Θηκετ' σὺ δ' ἄρ' ὅμα διαλαχεῖν τόδε.
Ὑπὸ μαινῶντι διδιδαντ' ἑρρο δόμου.

Additque acclamationem egregiam: *οὐτως ἀμικτός ἐστί καὶ θηριώδης ἡ τῆς πλεονεξίας ὑπόθεσις.* Adeo *in sociabile ferinusque est propositum plus suo habendi.* Cicero epist. xi. 16. *omnia sunt incerta, cum a jure discessum est.* Polybius iv: *καὶ γὰρ κατ' ἰδίαν τε τῶν βασιουργῶν καὶ κλεπτικῶν φύλον τοῦτο μέγιστα τῇ τρόπῃ σφάλλεται, τῇ μὴ ποιεῖν ἀλλήλοις τὰ δίκαια, καὶ συλλήβδην διὰ τὰς εἰς αὐτοὺς ἀδυσίας.* *Nam et privata coitiones facinororum ac furum hoc maxime modi everti solent, ubi inter se jus non præstant, et in summa, ubi fides inter ipsos periit.* (Cap. 29.)

⁴ Immo PLATO, ni fallor. Neque enim ullus, quod sciam, talem sententiam ex Aristotele protulit, quum tamen

of mutual rights, which Aristotle [rather Plato, J. B.] proves by the strong instance of a society of robbers; assuredly that society which includes the whole human race, or at any rate, the greater part of nations, has need of the recognition of rights: as Cicero saw when he said that some things are so bad that they are not to be done even for the sake of saving our country (*Off.* i. 45). Aristotle speaks with strong condemnation of those, who, while they will allow no one to hold rule among themselves, except him who has the right to do so, yet in their dealings with strangers have no care of rights, or the violation of rights.

24 A little while ago we quoted Pompey for his expression on the other side; yet on the other hand, when a certain Spartan king had said, Happy that republic which has for its boundaries the spear and the sword, Pompey corrected him, and said, Happy rather that which has justice for its boundary*. And to this effect he might have

* Barbeyrac conjectures that this anecdote of Pompey, for which he cannot

bus haberet. Quam ad rem alterius itidem Spartani regis uti potuit auctoritate, 'qui militari fortitudini justitiam anteposuit, hoc argumento, quod fortitudo justitia quadam regi deberet, at si justi essent homines omnes, fortitudine illa non indigerent. Ipsam fortitudinem Stoici definiebant virtutem propugnantem pro æquitate. Themistius oratione ad Valentem facunde disserit, reges, quales exigit sapientiæ regula, non unius sibi creditæ gentis habere rationem, sed totius

[[Agessilai, Apud Plutarchum, *Apophthegmata* p. 213 B.]]

Apud Ciceronem, *De Offic.* i. 19.

loca veterum in hanc rem congerere voluerint Interpretes in CICEERO. *De Offic.* ii. 11. Locus autem Platonis lusculentus ab iis indicatus est, quem reperies Lib. i. *De Republ.* pag. 351 C. Tom. II. *Ed. H. Steph.* Hæc in prima Editione dicebam. Reperi postea locum Aristotelis, qui ad rem facit, apud ΣΤΟΒΑΕΙΟΝ, Serm. x. pag. 131. *Ed. Geneva.* 1609. J. B.

² Innuit Auctor, quod CICEERO dixit: *Sunt enim quedam ita fæda, ut ea, ne conservandæ quidem patriæ causa sapiens facturus sit.* *De Offic.* i. 45. J. B.

³ *Graviter eos accusat Aristoteles*] Et Plutarchus *Agessilao*: Δακεδαιμόνιοι τὴν πρώτην τοῦ καλοῦ μερίδα τῇ τῆς πατρίδος συμφέρουσι δίδόντες, οὐτε μανθάνουσιν, οὐτε ἐπίστανται δίκαιον ἄλλο, πλὴν τῆ τῆς Σπάρτης ἀδξείν νομίζουσι. *Lacedæmonii pri-*

mam honesti partem ponentes in patria suæ utilitate, jus aliud nec norunt nec discunt, quam unde Spartam putent posse augeri. (Pag. 617 D.) De iisdem Lacedæmoniis Atheniensibus apud Thucydidem libro v: πρὸς σφᾶς μὲν αὐτοὺς καὶ τὰ ἐπιχώρια νόμιμα, πλεῖστα δρετῇ χρῶνται. πρὸς δὲ τοὺς ἄλλους πολλὰ ἂν τις ἔχων εἰπεῖν ὡς προσφέρονται, ξυνελών μάλιστα· ἂν δηλώσειεν, ὅτι τὰ μὲν ἡδέα καλὰ νομίζουσι, τὰ δὲ ξυμφέροντα δίκαια. Quod ipsos inter se et civilia jura attinet, plurimum virtute utuntur. Quales vero sint adversus alios, multa adferri possint eo pertinentia, breviter autem rem exposuerit, qui dixerit eis honesta videri quæ suavia sunt, *justa quæ utilia.* (Cap. 105.)

⁴ *Qui militari fortitudini justitiam anteposuit*] Agessilaus cum Persarum regem magnum audiret appellari, *quomodo*, inquit, *major me est, nisi sit jus-*

used the authority of another Spartan king, who gave justice the preference over military courage, on this ground; that courage is to be regulated by justice, but if all men were just, they would have no need of courage. Courage itself was defined by the Stoics, Virtue exercised in defence of Justice. Themistius, in an Oration to Valens, eloquently urges, that kings such as the rule of wisdom requires them to be, ought not to care for the single nation only which is committed to them, but for the whole human race; they should be, as he expresses it, not *philo-macedonian* only, or *philo-roman*, but

find any other authority, was produced, by Grotius mixing together in his memory two stories, both told in Plutarch's *Apophthegmata*: one, of a saying of Agessilaus, (or Archidamus,) who, when asked how far the Lacedæmonian territory extended, swung his spear and said, *So far*: the other story, that when Phraates sent to Pompey and begged that the Parthians might have, for their boundary towards the Romans, the Euphrates; Pompey replied that the boundary should be Justice. Tydman (in his Preface) defends Grotius from Barbeyrac's charge of confusion in this quotation.

humani generis, et esse, ut ipse loquitur, non φιλομακέδοντας tantum, aut φιλορωμαίους, "sed φιλανθρώπους. ^xMinois invisum apud posteros nomen non aliud fecit, quam quod æquitatem imperii sui finibus terminaret.

*Bellumque:
inde belli
jura.*

25 Tantum vero abest ut admittendum sit quod quidam fingunt, in bello omnia jura cessare, ut nec suscipi bellum debeat nisi ad juris consecutionem, nec susceptum geri nisi intra juris ac fidei modum. Bene⁷ Demosthenes bellum esse in eos dixit, qui judiciis coerceri nequeunt. Judicia enim vigent adversus eos qui invalidiores se sentiunt: in eos, qui pares se faciunt aut putant, bella sumuntur; sed nimirum, ut recta sint, non minori religione exercenda, quam judicia exerceri solent.

26 Sileant ergo leges inter arma, sed civiles illæ et judiciaræ et pacis propriæ, non aliæ perpetuæ et omnibus tem-

tor? Et hoc apud Plutarchum. (*Apophthegm.* pag. 213 c.)

^a Sed φιλανθρώπους] Optime M. Antoninus: πόλις καὶ πατρίς ὡς μὲν Ἀντωνίνῳ μοι ἢ Ῥώμῃ, ὥς δὲ ἀνθρώπῳ ὁ κόσμος· civitas et patria mihi ut Antonino Roma, ut homini mundus. (Lib. vi. § 44.) Porphyrius *de non esu animalium* III: ὁ λόγος ἀγόμενος καὶ πρὸς πόλιν καὶ τηρεῖ τὸ δβλαβεῖν, καὶ ἔτι μᾶλλον πρὸς ξένους καὶ πρὸς πάντας ἀνθρώπους, ὁ τὴν ἀλογίαν ἔχων ὑπὴρκοον καὶ αὐτὸς παρ' ἐκείνους λογιώτερος, διὰ ταῦτα δὲ καὶ θεώτερος·

Qui ratione ducitur, innocentiam in cives servat, imo et in peregrinos et homines quosvis, quanto ratione præstantior, tanto divitior. [Vertendum erat, non immo et in peregrinos &c. ut habet Auctor; sed, magis adhuc in etc. quod alium sensum efficit. Deinde reliqua non omnino adæquate expressa sunt. Ceterum locus est pag. 333. *Ed. Lugd.* 1620. J. B.]

^x Minois] De quo versus est veteris Poetæ:

Καὶ νήσων δαίραισι βαρὺν ζυγὸν ἔμβαλε Μίνως·

philanthropic. The name of Minos became hateful to posterity in no other way than this: that he terminated his equity at the boundaries of his own government.

25 It is so far from being proper to admit, what some choose to say, that in war all rights cease, that war is never to be undertaken except to assert rights; and when undertaken, is never to be carried on except within the limits of rights and of good faith. Demosthenes well said, that war was the mode of dealing with those who could not be kept in order by judicial proceedings. For judicial proceedings are of force against those who feel themselves to be the weaker party: but against those who make themselves or think themselves equals, war is the proceeding; yet this too, in order to be justifiable, to be carried on in a no less scrupulous manner than judicial proceedings are.

26 Be it so then, that, in the conflict of arms, laws must be silent: but let this be understood of laws civil, judicial, proper to peace; not of those laws which are perpetual and accommodated to all time. For

poribus accommodatæ. Optime enim dictum est a Dione Prusæensi, inter hostes scripta quidem jura, id est, civilia non valere, at ¹valere non scripta, id est, ea quæ natura dictat aut gentium consensus constituit. Docet hoc vetus illa Romanorum formula: *eas res puro pioque duello quærendas censeo*. Iidem veteres Romani, ut Varro notabat, bella tarde et nulla licentia suscipiebant, quod bellum nullum nisi pium putabant geri oportere. Camillus juste non minus quam fortiter bella gerenda dicebat: Africanus, populum Romanum et suscipere juste bella et finire: Apud alium legas, *Sunt et belli, sicut et pacis jura*. Alius Fabricium miratur ingentem virum, et quod difficillimum est in bello innocentem, et qui aliquid esse crederet et in hostem nefas.

De Vit. Pop.
Rom. apud
Non. p. 539.

Liv. v. 27.

Idem xxx. 16.

[[Liv. v. 27.]]

[[Seneca ep.
120.]]

27 Quantam vim habeat in bellis ²justitiæ conscientia passim ostendunt historiarum scriptores, qui victoriam sæpe

Insula cuncta Jugo Minois pressa gemitat.

Vide hac de re Cyrillum *adversus Julianum* libro vi. [Pag. 191. *Ed Spanhem.* ubi tamen versus paullo aliter refertur. J. B.]

¹ Locus est in Oratione de Chersoneso, pag. 38 c. J. B.

² *Valere non scripta*] Ideo Alfonsus rex interrogatus plusne libris an armis deberet, dixit, ex libris se et arma et armorum jura didicisse. Plutarchus: *εἰσὶ δὲ καὶ πολέμων ὁμοίαι τινὲς νόμοι τοῖς ἀγαθοῖς ἀνδράσι, καὶ τὸ κινῆν οὐχ ὅπως δικαίον, ἀλλ' ὥστε μὴ φεύγειν τὰς*

ἐκ κακῶν καὶ ἀσεβῶν ἔργων χάριτας· *Sunt apud viros bonos quedam et belli jura, nec ita sectanda victoria est, ut non fugiatur utilitas ex pravis impiisque actionibus proveniens.* (Vit. Camill. p.134.)

³ *Justitiæ conscientia*] Bene apud Appianum Pompeius: *θαρρῆν δὲ χρῆ τοῖς τε θεοῖς καὶ αὐτῷ τῷ λογισμῷ τοῦ πολέμου καλὴν καὶ δικαίαν ἔχοντι φιλοτιμίαν ὑπὲρ πατρῶν πολιτείας*. (Bell. Civ. Lib. II. p. 460.) *confidere oportet Diis et causæ belli honeste justoque suscepti studio ad tuendum patriæ statum.* Cassius apud eundem: *μεγί-*

it is excellently said by Dio Prusæensis, that between enemies, written laws, that is, Civil Laws, are not in force; but that unwritten laws are, namely, those which nature dictates, or the consent of nations institutes. We may learn this from the old Formula of the Romans; *I decide that those things may be sought by a pure and pious war*. The same old Romans, as Varro remarked, undertook war tardily, and without allowing themselves any licence, because they thought that no war except a pious one ought to be undertaken. Camillus said that wars were to be carried on no less justly than bravely. Africanus said, that the Romans began just wars, and ended them. Again, in Livy we read, *War has its laws no less than peace*. And Seneca admires Fabricius as a great man, and, what is most difficult, a man innocent even in war, and who thought that there were wrongs even towards an enemy.

27 How great the power of the conscience of justice is, the writers of histories everywhere shew, often ascribing victory to this cause

*Iusta causæ
conscientia,
que vis ejus.*

huic causæ præcipue ascribunt : Inde proverbialia illa, frangi et attolli vires in milite a causa : raro eum sospitem redire⁸ qui injusta arma sumserit : bonæ⁹ causæ spem adesse comitem ; et alia in eum sensum. Nec movere quenkum debent prosperi successus iniquarum molitionum : satis enim est quod causæ æquitas suam quandam eamque magnam habet vim ad agendum, quanquam ea vis, ut in rebus humanis accidit¹, sæpe aliarum causarum oppositu ab effectu impeditur. Etiam ad amicitias conciliandas, quibus ut singuli, ita et populi ad multas res opus habent, multum valet opinio de bello non temere nec injuste suscepto, pieque gesto. Nemo enim iis se facile adjungit quibus jus, fas, fidem vilia putat.

στη δ' ἐλπίς ἐν τοῖς πολέμοις ἐστὶ τὸ δίκαιον· *In bellis spes optima est, causæ jus.* (Ibid. Lib. iv. p. 645.) Josephus xv. *Antiquæ Historiæ* : μεθ' ὧν τὸ δίκαιον, μετ' ἐκείνων ὁ Θεός· *Abs quo stat jus, ab eo Deus* (cap. v. § 3. pag. 753. *Edit. Huds.*) Multa sunt apud Procopium in hanc sententiam : ut in oratione Belisarii in itinere in Africam, ubi hoc inter cetera : τὸ ἀνδρείον οὐκ ἐν νικῶν μὴ μετὰ τοῦ δίκαιου ταπτόμενον· *Victoriam fortitudo datura non est, nisi justitiam habeat commilitem* ; (Bell. Vand. Lib. i. c. 12.) et in altera oratione ante prælium non longe a Carthagine : (Ibid. c. 19.) et in Longobardorum sermone ad Herulos, ubi hæc, sed correctæ a nobis : μαρτυραμένοι τὸν θεὸν οὐπερ τῆς ῥοπῆς καὶ βραχεῖα τις τὸ παράπαν ἰκµὰς πάσῃ τῇ ἀνθρώπων δυνάμει

ἀντίζουσι ἔσται, αὐτόν τε εἰκὸς ταῖς πολέμοις αἰτίαις ἡγµένου, ἀμφοτέροις πρὸς ταυνεῦσαι τῆς μάχης τὸ πέρας· *Testatur Deus, cujus potentia vel minima particula omnem humanam vim æquiparat ; is, ut credibile est, belli causas intuens, dabit debitum utrique prælii exitum.* (Bell. Gotth. Lib. ii. c. 14.) Quod dictum eventus mox admirabilis comprobatur. Sic et apud eundem scriptorem ad *Gotthos Totilas*, (Lib. iii. c. 8) : οὐ γὰρ ἐστίν, οὐκ ἐστὶ τὸν ἀδικοῦντα καὶ βιαζόµενον ἐν τοῖς ἀγῶσι εὐδοκίµειν, ἀλλὰ πρὸς τὸν βίον ἐκάστου ἡ τοῦ πολέμου πρὸς ταυνεῖται τύχη· *Fieri nequit, nequit, inquam, fieri, ut qui violentia et injustitia utuntur, decus pugnando pariant, sed prout vita cuique est, ita ei obtingit belli fortuna.* Mox capta jam Roma alteram habet orationem To-

mainly. Hence have arisen these proverbs ; That it is the Cause which makes the soldier brave or base : that he rarely comes safe back who goes out on the bad side : that Hope is the ally of the good Cause : and others to the same effect. Nor ought any persons to be moved by the occasional success of unjust designs ; for it is enough if the equity of the cause has an efficacy, and that a great one, in action ; even though this efficacy, as happens in human affairs, is often prevented from taking effect, being counteracted by other causes. And further ; in conciliating friendships, which nations, as well as individuals, need, on many accounts, a great effect must be assigned to an opinion that we do not hastily or unjustly undertake war, and that we carry it on religiously. For no one readily joins himself to those whom he believes to think lightly of right laws and good faith.

28 Ego cum ob eas quas jam dixi rationes compertissimum haberem, esse aliquod inter populos jus commune, quod et ad bella et in bellis valeret, cur de eo instituerem scriptionem causas habui multas ac graves. Videbam per Christianum orbem vel barbaris gentibus pudendam bellandi licentiam: levibus aut nullis de causis ad arma procurri, quibus semel sumtis nullam jam divini, nullam humani juris reverentiam, plane quasi uno edicto ad omnia scelera emissio furore.

29 Cujus immanitatis conspectu multi homines minime mali eo venerunt, ut Christiano, cujus disciplina in omnibus hominibus diligendis præcipue consistit, *omnia arma interdicere: ad quos accedere interdum videntur et Joannes Ferus

tilas, (Lib. III. c. 21.) pertinentem eodem. Agathias vero libro II. ἀδικία γὰρ καὶ θεοῦ ἀθεραπεία φευκτά μὲν δὲ καὶ ἀσύμφορα. μάλιστα δὲ ἐν τῇ προσπολεμῆν καὶ παρατάττεσθαι. *Injustitia et Dei neglectus vitanda semper et noxia, tum vero maxime ubi res belli in acie cernitur.* (Lib. II. c. 1.) Probat id alibi Darii, Xerxis, et Atheniensium in Sicilia illustribus exemplis. (Ibid. c. 5.) Vide si libet et Crispini orationem ad Aquileienses apud Herodianum VIII. (c. 6.) Apud Thucydidem libro VII. Lacedæmonii clades ad Pylum et alibi acceptas sum culpæ acceptas ferunt, quod judicium provocati accipere recusassent. Sed cum postea Athenienses multis editis improbis facinoribus judicium defugissent, spes inde mellorum successuum ad Lacedæmonios rediit.

(Cap. 18.)

* Ita habet fragmentum ex EUBIPIDIS *Erechtheo* :

Οὐδείς στρατεύσας ἀδικα σῶς ἦλθεν πάλιν.
Vers. 44. Collect. Barnes. [ap. Dindorf. *Fragm. v.*]

* Innuere videtur illud LUCANI :

Causa jubet melior Superos sperare secundos.
Pharsal. VII. 349. Adde MENANDRI fragmentum e *Vulcanalibus*, pag. 190. *Edit. Cleric.* et loca ab Auctore nostro infra adferenda, Lib. II. c. 1. § 1. *J. B.*

¹ Nam sepe honestas rerum causas, ni judicium adhibeas, perniciosi exitus consequuntur. Ita Otho apud TACITUM, *Hist.* I. 83. *J. B.*

* *Omnia arma interdicerent*] Tertullianus de *Resurrectione Carnis*: *Gladus bene de bello cruentus et melior homicida.* (Cap. 16.)

28 I, for the reasons which I have stated, holding it to be most certain that there is among nations a common law of Rights which is of force with regard to war, and in war, saw many and grave causes why I should write a work on that subject. For I saw prevailing throughout the Christian world a license in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint.

29 And the sight of these atrocities has led many men, and these, estimable persons, to declare arms forbidden to the Christian, whose rule of life mainly consists in love to all men: and to this party sometimes John Ferus and our countryman Erasmus seem to

et Erasmus^a nostras, viri pacis et Ecclesiasticæ et civilis amantissimi; sed eo, ut arbitror, consilio, quo solemus, quæ in unam partem exierunt, in alteram reflectere, ut in verum modum redeant. Verum hic ipse nimium contranitendi conatus sæpe adeo non proficit, ut obsit etiam, quia deprehensum facile quod in his nimium est, etiam aliis dictis intra verum stantibus auctoritatem detrahit. Medicina ergo utrisque adhibenda fuit, tum ne nihil, tum ne omnia crederentur licere.

*Jurisprudentiam
studium, ex-
emplo mo-
dum.*

30 Simul et jurisprudentiam, quam antehac in muneribus publicis quanta potui integritate exercui, nunc quod mihi indigne e patria tot meis laboribus ornata ejecto restabat, privatæ diligentiae studio adjuvare volui. Artis formam ei imponere multi antehac destinarunt: perfecit nemo: neque vero fieri potest, nisi, quod non satis curatum est hactenus, ea quæ ex constituto veniunt a naturalibus recte separentur: nam naturalia, cum semper eadem sint, facile possunt in artem colligi: illa autem, quæ ex constituto veniunt, cum et mutantur sæpe, et alibi alia sint, extra artem posita sunt, et aliæ rerum singularium perceptiones.

^a Vide Viri magni *Adagia*, ubi in tritum illud: *Dulce bellum inexpertis.*
hanc rem fuse digreditur, dum exponit *J. B.*

approximate, men much devoted to peace, both ecclesiastical and civil; but they take this course, as I conceive, with the purpose with which, when things have been twisted one way, we bend them the other, in order to make them straight. But this attempt to drive things too far, is often so far from succeeding, that it does harm; because the excess which it involves is easily detected; and then, detracts from the authority of what is said, even within the limits of truth. We are to provide a remedy for both disorders; both for thinking that nothing is allowable, and that everything is.

30 Moreover, having practised jurisprudence in public situations in my country with the best integrity I could give, I would now, as what remains to me, unworthily ejected from that country graced by so many of my labours, promote the same subject, jurisprudence, by the exertion of my private diligence. Many, in preceding times, have designed to invest the subject with the form of an Art or Science; but no one has done this. Nor can it be done, except care be taken in that point which has never yet been properly attended to;—to separate Instituted Law from Natural Law. For Natural Law, as being always the same, can be easily collected into an Art: but that which depends upon institution, since it is often changed, and is different in different places, is out of the domain of Art; as the per-

31 Quod si qui veræ justitiæ sacerdotes naturalis et perpetuæ jurisprudentiæ partes tractandas susciperent, semotis iis quæ ex voluntate libera ortum habent, alius quidem de legibus, alius de tributis, alius de judicum officio, alius de voluntatum conjectura, alius de factorum facienda fide, posset deinde ex omnibus partibus collectis corpus confici.

32 Nos certè quam viam ineundam censeremus re ipsa ^{IV.} *Operis contentia et ordo.* potius quam verbis ostendimus in hoc opere, quod partem jurisprudentiæ longe nobilissimam continet.

33 Primo enim libro præfati de juris origine generalem ^{Lib. I.} examinavimus quæstionem, sitne bellum aliquod justum: deinde ad noscenda publici privatique belli discrimina explicandam habuimus vim ipsam summi imperii, qui eam populi, qui reges solidam, qui ex parte, qui cum alienandi jure, qui aliter habeant: deinde et de subditorum in superiores officio dicendum fuit.

34 Liber secundus cum omnes causas, ex quibus bellum ^{Lib. II.} oriri potest, exponendas sumserit, quæ res communes sint, quæ propriæ, quod jus personis in personas, quæ ex dominio nascatur obligatio, quæ successionum regiarum norma, quod jus

ceptions of individual things in other cases also is.

31 If, then, those who have devoted themselves to the study of true justice would separately undertake to treat of separate parts of Natural and Permanent Jurisprudence, omitting all which derives its origin from the will of man alone:—if one would treat of Laws; another, of Tributes; another, of the Office of Judges; another, of the mode of determining the Will of parties; another, of the Evidence of facts; we might, by collecting all these parts, form a complete body of such Jurisprudence.

32 What course we think ought to be followed in the execution of such a task, we shew by act rather than by words, in this present work; in which is contained by far the noblest part of Jurisprudence.

33 For in the First Book, (after a Preface concerning the origin of Rights and Laws,) we have examined the question whether any war be just: next, in order to distinguish between public and private war, we have to explain the nature of sovereignty; what Peoples, what Kings, have it entire; what, partial; who, with a right of alienation; who, otherwise; and afterwards we have to speak of the duty of subjects to superiors.

34 The Second Book, undertaking to expound all the causes from which war may arise, examines what things are common, what are property, what is the right of persons over persons, what obliga-

veniat ex pacto aut contractu, quæ federum, quæ jurisjurandi tum privati, tum publici vis atque interpretatio, quid ex damno dato debeatur, quæ legatorum sanctimonia, quale jus humandi mortuos, quæ pœnarum natura, late exsequitur.

Lib. iii.

35 Tertius liber primum subjectam sibi habens materiam, id quod in bello licet, cum id quod impune fit aut etiam apud populos externos pro jure defenditur ab eo quod vitio caret distinxisset, descendit ad pacis genera, et omnes bellicas conventiones.

V.
Scriptoris
necessitas.

36 Eo autem majus visum est pretium operæ, quod ut dixi totum hoc argumentum tractavit nemo, et qui tractarunt partes, ita tractarunt, ut multum reliquerint alienæ industriæ. Veterum philosophorum nihil exstat hujus generis, neque Græcorum, quos inter Aristoteles librum fecerat cui nomen *δικαι-*

Scriptorum
veterum hæc
in re inopia.

^b Wilhelmo Matthæi] Adde his Johannem de Carthagena editum Romæ anno c10 lxx ix.

^c In omnibus Editionibus hæcenus

legebatur Fr. Ario: sed Auctorille Hispanus Arias vacabatur, et hoc nomine editus est ejus liber *De Bello et ejus justitia*, in TRACTATU TRACTATUM, Tom.

tion arises from ownership, what is the rule of royal succession, what right is obtained by pact or contract, what is the force and interpretation of treaties, of oaths private and public, what is due for damage done, what is the sacredness of ambassadors, the right of burying the dead, and the nature of punishments.

35 The Third Book has for its subject, in the first place, what is lawful in war; and when it has drawn a distinction between that which is done with impunity, or may even, in dealing with foreigners, be defended as consistent with Rights; and that which is really free from fault; it then descends to the kinds of Peace and to Conventions in War.

36 The undertaking such a work appeared to me the more worthy of the labour which it must cost, because, as I have said, no one has treated the whole of the argument; and those who have treated parts thereof, have so treated them that they have left much to the industry of others. Of the old philosophers nothing is extant of this kind, neither of the Greeks, among whom Aristotle is said to have written a book called the *Laws of War**, nor of those (the Fathers) who wrote as Christians in the early period of the Church; which is much to be regretted; and even of the books of the ancient Romans concerning the Law recognized by their *Feciales*, or *Heralds' College*, we have received nothing but the name. [See Cic. *Off.* i. 11; iii. 29.] Those who have made what they call *Summæ of Cases of*

* But the true reading is *Δικαιώματα πόλεων*, the *Laws of States*. J. B.

ώματα πολέμων, neque eorum qui Christianismo recenti nomen dederunt, quod valde optandum fuerat: etiam Romanorum veterum libri de jure feciali nihil ad nos sui præter nomen transmiserunt. Hi qui summas fecerunt casuum quos vocant conscientiae, ut de aliis rebus, ita et de bello, de promissis, de juramento, de repressaliis capita fecerunt. [Vide infra lib. 3. 7. J. B.]

37 Vidi et speciales libros de *Belli Jure* partim a theologis scriptos, ut a Francisco Victoria, Henrico Gorichemo, ^bWilhelmo Matthæi; partim a doctoribus juris, ut Joanne Lupo, ³Francisco Aria, Joanne de Lignano, Martino Laudensi: sed hi omnes de uberrimo argumento paucissima dixerunt, et ita plerique, ut sine ordine quæ naturalis sunt juris, quæ divini, quæ gentium, quæ civilis, quæ ex canonibus veniunt, permiscerent atque confunderent. Recentiorum defectus.

xvi. Ed. Venet. 1584. Ibidem reperiuntur JOANNES LUPUS, Segobiensis, *De Bello et Bellatoribus*: JOANNES à LIGNANO, Bononiensis, *De Bello*: et MAR-

TINUS GARATUS, Laudensis, de eodem argumento. Postremus, simul cum AYALA, *De Jure et Officiis Bellicis*, editus est etiam Lovanii, ann. 1648. J. B.

Conscience, have introduced chapters, as concerning other things, so concerning war, concerning promises, concerning oaths, concerning reprisals.

37 I have also seen special books concerning the Laws of War, written partly by theologians, as Francis Victoria*, Henry Gorichem†, William Matthæi [Mathison?], Johannes de Carthagera‡; some by Doctors of Law, as Johannes Lupus§, Francis Arias||, Joannes à Lignano¶, Martinus Laudensis**. But all these have said very little, considering the copiousness of the argument; and said it in such a way that they have mingled and confounded law natural, law divine, law of nations, civil law, and canon law.

* A Spanish Dominican who lived in the 16th century. The treatise here mentioned is *De Indis et Jure Belli*, and appears among his twelve theological lectures.

† A Dutchman so named from the place of his birth, and chancellor of Cologne. He lived about the middle of the fifteenth century, and wrote a treatise *De Bello Justo*.

‡ His book was printed at Rome in 1609.

§ A native of Segovia. His Treatise *De Bello et Bellatoribus* may be found in a large collection called *Tractatus Tractatum*. Tom. xvi, of the Venice edition, 1584.

|| A Spaniard. His book is in the same volume of the same collection, under the title *De Bello et ejus Justitia*.

¶ A native of Bologna. His Treatise *De Bello* is in the same volume.

** His name was Garat. His Treatise *De Bello* appears in the same volume of the Collection. It was reprinted at Louvain in 1648, with the Treatise of Ayala, spoken of afterwards.

38 Quod his omnibus maxime defuit, historiarum lucem supplere aggressi sunt eruditissimus Faber in *Semestrium capitibus* nonnullis, sed pro instituti sui modo, et testimoniis tantum allatis; diffusius, et ut ad definitiones aliquas exemplorum congeriem referrent, Balthazar Ayala, et plus eo Albericus Gentilis: cujus diligentia sicut alios adjuvari posse scio et me adjutum profiteor, ita quid in dicendi genere, quid in ordine, quid in distinguendis quæstionibus, jurisque diversi generibus desiderari in eo possit, lectoribus judicium relinquo. Illud tantum dicam, solere eum sæpe in controversiis definiendis sequi aut exempla pauca non semper probanda, aut etiam auctoritatem novorum jurisconsultorum in responsis, quorum non pauca ad gratiam consulentium, non ad æqui bonique naturam sunt composita. Causas, unde bellum justum aut injustum dicitur, Ayala non attigit: Gentilis summa quæ-

* Ita reposuimus pro eo, quod erat in omnibus Edd. *docendi genere*. Nimirum non congruit stylo Auctoris nostri, ad brevitatem maximam, si quis usquam, composito, ut ita idem bis di-

ceret, quum sequentia ad modum docendi pertineant, et hoc primum caput ab aliis manifesto distinguatur. Deinde non potuit non multa improbare in *genere dicendi*, quo usus est Albericus

38 What was most wanting in all these, namely, illustrations from history, the learned Faber* has undertaken to supply in some chapters of his *Semestria*: but no further than served his own special purpose, and only giving references. The same has been done more largely, and that, by applying a multitude of examples to certain maxims laid down, by Balthazar Ayala †, and still more largely by Albericus Gentilis‡; whose labour, as I know it may be serviceable to others, and confess it has been to me, so what may be faulty in his style, in his arrangement, in his distinctions of questions, and of the different kinds of Law, I leave to the judgment of the reader. I will only say, that in the decision of controversies he is often wont to follow, either a few examples that are not always to be approved of, or else the authority of modern lawyers in opinions given, not a few of which are accommodated to the interest of those that consult them, and not founded upon the nature of equity and justice. The

* Peter du Faur of St Jori, Councillor of the Grand Council, afterwards Master of Requests, and at last First President of the Parliament of Thoulouse. He was scholar to Cujas. His work entitled *Semestrium Libri Tres* has been several times printed at Paris, Lyons, and Geneva.

† He was a native of Antwerp, of Spanish extraction. His Treatise *De Jure et Officiis Bellicis* was printed at that city in 1597.

‡ Professor at Oxford about 1600. His book is *De Jure Belli*.

dam genera quo ipsi visum est modo delineavit; multos vero et nobilium et frequentium controversiarum locos ne attigit quidem.

39 Nos ne quid tale indictum abiret, operam dedimus, VI
indicatis etiam dijudicationum fontibus, unde facile esset etiam si quid omissum a nobis esset definire. Superest ut quibus ego auxiliis et qua cura hanc rem aggressus sim breviter exponam. Primum mihi cura hæc fuit, ut eorum quæ ad jus naturæ pertinent probationes referrem ad notiones quasdam tam certas, ut eas nemo negare possit, nisi sibi vim inferat⁵. Principia enim ejus juris, si modo animum recte advertas, perse patent atque evidentiæ sunt, ferme ad modum eorum quæ sensibus externis percipimus; qui et ipsi bene conformatis sentiendi instrumentis, et si cetera necessaria adsint, non fallunt. Ideo in Phœnissis Euripides sic loquentem facit Poly- Vers. 467, et
nien, cujus aperte justam vult fuisse causam: seqq.

1. Cura Au-
toris.
1. Jura pro-
bandi:
Naturale.

Gentilis: et ipse tacite videtur ei oppo-
nere illud, quo usum se profitetur, § 69.
J. B.

Præfatione nostra ad PUFENDORFIUM
De Jure Nat. et Gent. § 1, et seqq.
J. B.

⁵ De illa evidentiæ fusc egimus in

causes for which a war is denominated just or unjust, Ayala has not so much as touched upon: Gentilis has indeed described, after his manner, some of the general heads; but many prominent and frequent cases of controversy he has not even touched upon.

39 We have been careful that nothing of this kind be passed over in silence; having also indicated the sources from which we derive our judgments, so that it may be easy to determine any question that may happen to be omitted by us. It remains now that I briefly explain with what aids, and with what care, I undertook this work.

In the first place, it was my object to refer the truth of the things which belong to Natural Law to some notions, so certain, that no one can deny them, without doing violence to his own nature. For the principles of such Natural Law, if you attend to them rightly, are of themselves patent and evident, almost in the same way as things which are perceived by the external senses; which do not deceive us, if the organs are rightly disposed, and if other things necessary are not wanting. Therefore Euripides in his *Phœnissæ* makes Polynices, whose cause he would have to be represented manifestly just, express himself thus:

I speak not things hard to be understood,
But such as, founded on the rules of good
And just, are known alike to learn'd and rude.

Hæc sum profatus, mater, haud ambagibus
Implicita, sed quæ regulis æqui et boni
Suffulta ^crudibus pariter et doctis patent.

Statim addit chori (constat is autem ex feminis iisque barbaris,) iudicium, dicta approbantis.

40 Usus sum etiam ad juris hujus probationem ^dtestimoniis philosophorum, historicorum, poetarum, postremo et oratorum: non quod illis indiscrete credendum sit; solent enim sectæ, argumento, causæ servire: sed quod ubi multi diversis temporibus ac locis idem pro certo affirmant, id ad causam universalem referri debeat: quæ in nostris quæstionibus alia esse non potest, quam aut recta illatio ex naturæ principiis procedens, aut communis aliquis consensus. Illa jus naturæ indicat, hic jus gentium: quorum discrimen non quidem ex ipsis testimoniis, (passim enim scriptores voces juris naturæ et gentium permiscent) sed ex materiæ qualitate intelligendum est. Quod enim ex certis principiis certa argumentatione

Gentium.

2. Discriminandi utrumque.

^c Rudibus pariter et doctis patent]

Idem Euripides Andromacham Hermonæ dicenti, (vers. 242):

Οὐ βαρβάρων νόμοισιν οἰκοῦμεν πόλιν.

Non barbarorum more in urbe hac vivitur.

respondentem facit:

Ἐκεῖ τὰ γ' αἰσχροὶ καὶ θεοὶ αἰσχύνῃν ἔχου.

Quæ turpia illis, hic quoque haud culpa vacant.

[In hanc sententiam dixit CASSIODORUS: *Laboriosum quidem, sed non est impossibile, justitiam suadere mortali-*

And he immediately adds the judgment of the chorus, (which consisted of women, and these too barbarians,) approving what he said.

40 In order to give proofs on questions respecting this Natural Law, I have made use of the testimonies of philosophers, historians, poets, and finally orators. Not that I regard these as judges from whose decision there is no appeal: for they are warped by their party, their argument, their cause: but I quote them as witnesses whose conspiring testimony, proceeding from innumerable different times and places, must be referred to some universal cause; which, in the questions with which we are here concerned, can be no other than a right deduction proceeding from the principles of reason, or some common consent. The former cause of agreement points to the Law of Nature; the latter, to the Law of Nations: though the difference of these two is not to be collected from the testimonies themselves, (for writers everywhere confound the Law of Nature and the Law of Nations,) but from the quality of the matter. For what cannot be deduced from certain principles by solid reasoning, and yet is seen and observed everywhere, must have its origin from the will and consent of all.

41 I have, therefore, taken pains to distinguish Natural Law from

deduci non potest, et tamen ubique observatum apparet, sequitur ut ex voluntate libera ortum habeat.

41 Itaque hæc duo non minus inter se, quam a jure civili *Civile* discernere semper unice laboravi: imo et in gentium jure discrevi id quod vere et ex omni parte jus est, et id quod duntaxat effectum quendam externum ad instar illius primitivi juris parit: nempe ne vi resistere liceat, aut etiam ut ubique *Species cujusque* vi publica, utilitatis alicujus causa, vel ut incommoda gravia vitentur, defendi debeat: quæ observatio quam sit necessaria ad res multas, in ipso operis contextu apparebit. Non minus sollicitè superavimus ea, quæ juris sunt stricte ac proprie dicti, unde restitutionis obligatio oritur, et ea quæ juris esse dicuntur, quia aliter agere, cum alio aliquo rectæ rationis dictato pugnat: de qua juris diversitate aliquid jam et supra diximus.

42 Inter philosophos merito principem obtinet locum Aristoteles, sive tractandi ordinem, sive distinguendi acumen, sive rationum pondera consideres. Utinam tantum principa-

II. *Auxilia scripti.*
I. *Philosophi. Aristoteles, ejus laus.*

bis: quam ita cunctorum sensibus beneficium Divinitatis attribuit, ut et qui nesciunt jura, rationem tamen veritatis agnoscant. Necesse est enim, ut quod a natura conceditur, submonente iterum eadem, suaviter audiat. Varr. VII.

26. J. B.]

^d *Testimoniis philosophorum*] Quidni, cum Alexander Severus Ciceronis de republica et officiis libros perpetuo lectitarit? [Lamprid. in ejus Vit. c. 30.]

the Law of Nations, as well as both from the Civil Law. I have even distinguished, in the Law of Nations, that which is truly and universally lawful, true Rights; and *quasi*-Rights, which only produce some external effect similar to that of the true Rights: for instance, this effect; that they may not be resisted by force, or may even be defended by force, in order to avoid grave inconvenience. [Such *quasi*-Rights are those of a Master over his slave, where slavery is established by Law. W.] How necessary this observation is in many instances, will appear in the course of the work. No less careful have I been to separate those things which belong to *Jus*, or *Right*, properly and strictly so called, (out of which arises the obligation of restitution,) and those which are more laxly described by *right*, adjectively; because to act otherwise is at variance with some dictate of right reason; concerning which diversity of *Jus* or *Right* we have already said something above.

42 Among the philosophers, the first place is deservedly assigned to Aristotle; whether we regard the order of his treatment of these subjects, or the acuteness of his distinctions, or the weight of his reasons. Only it were to be wished that his authority had not, some

tus ille ab aliquot hinc sæculis non in tyrannidem abiisset, ita ut veritas, cui Aristoteles fidelem navavit operam, nulla jam re magis opprimatur quam Aristotelis nomine. Ego et hic et alibi veterum Christianorum sequor libertatem, qui in nullius philosophorum sectam juraverant, non quod eis assentirentur qui nihil percipi posse dicebant, quo nihil est stultius; sed quod nullam esse sectam putarent, quæ omne verum vidiasset, et nullam quæ non aliquid ex vero. Itaque ⁶veritatem sparsam per singulos, per sectasque diffusam, in corpus colligere, id vero existimabant nihil esse aliud quam vere Christianam tradere disciplinam.

Reprehensio.

43 Inter cetera, ut hoc obiter a nostro instituto non alienum dicam, non sine causa videntur mihi ab Aristotele discedere et ⁶Platonici nonnulli ⁷et Christiani veteres, in eo quod

* *Veritatem sparsam per singulos*] Verba sunt Lactantii *Institutionum* vii. cap. 7. Justinus *Apologetico* priore: [Cap. 13. pag. 200. *Edit. Otto*, ubi secunda ista *Apologia* habetur.] οὐχ ὅτι ἀλλότριά ἐστι τὰ Πλάτωνος διδύγματα τοῦ Χριστοῦ, ἀλλ' ὅτι οὐκ ἔστι πᾶντ' ὅμοια. Ὡς περ οὐδὲ τῶν ἄλλων Στωϊκῶν τε καὶ ποιητικῶν καὶ συγγραφέων. ἕκαστος γὰρ τις ἀπὸ μέρους τοῦ σπερματικοῦ [θεοῦ] λόγου τὸ συγγενὲς ὁρῶν καλῶς ἐφθέρχεται. *Non quod plane aliena sint Platonis dogmata a Christi dogmatibus, sed quod nec plane convenient, ut nec aliorum*

dogmata, puta Stoicorum, poetarum, et historia scriptorum. Eorum enim quisque ab inrita ratione [divina] id, quod ei consentaneum est, ex parte videns eatenus recte dixit. Tertulliano, Seneca sæpe noster, (Lib. de Anima, cap. 20.) sed, ut idem nos monet, [adversus Judæos, cap. 9.] nulli hominum universalis spiritualium documentorum competeat, nisi in Christum. Augustinus epistola cccii: Mores illi, quos Cicero philosophique alii commendant, in ecclesiis toto orbe crescentibus docentur atque discuntur. Vide si vacat hac super re eundem Augustinum de Platonice,

ages ago, been converted into a tyranny by others; so that Truth, in the pursuit of which Aristotle faithfully spent his life, suffers no oppression so great as that which is inflicted in Aristotle's name. I, both here and in other places, follow the liberty of the old Christians, who did not pin their faith to any sect of philosophers; not that they agreed with those who say that nothing can be known; than which nothing is more foolish; but that they thought that there was no sect which had seen the whole of the truth, and none which had not seen some part of the truth. They therefore aimed at collecting the truth which was diffused among individual philosophers, and among sects, into one body: and they thought that this result could be nothing else but the true Christian doctrine.

43 Among other points, to mention this in passing, as not foreign to our purpose, it appears to me that both some of the Platonists and the ancient Christians had good reason to depart from Aristotle's doc-

ille naturam ipsam virtutis in mediocritate affectuum actionumque posuerit: quod semel positum eo ipsum abduxit, ut et virtutes diversas, puta liberalitatem et parsimoniam, in unam compingeret; et veritati daret opposita minime ex æquo respondentia, jactantiam et dissimulationem; et quibusdam rebus vitii nomen imponeret, quæ aut non existunt, aut vitia per se non sunt, ut contemptum voluptatis et honorum, et iræ adversus homines vacuitatem.

44 Non recte autem universaliter positum hoc fundamentum vel ex justitia apparet, cui oppositum nimium et parum, cum in affectibus et sequentibus eos actionibus invenire non posset, in rebus ipsis circa quas justitia versatur utrumque quassavit: quod ipsum primum est desilire de genere in genus alterum, quod in aliis merito culpat: deinde minus suo acci-

*Virtus non
omnis vitium
habet in ex-
cessu.*

quos paucis mutatis ait Christianos esse epistola LVI. (CXVIII. secundum divisionem Edit. nov. Benedictin.) et de vera religione capite III. et confessionum libro VII. c. 9. et libro VIII. cap. 2. [Potest etiam hac de re videri CLEMENS ALEXANDRINUS, præsertim Strom. Lib. I. c. 7. ibique recentissimum Editorem, J. Potterum, Episcopum Oxoniensem, pag. 338. Adde OLEARIJ Dissert. De Philosophia Eclectica, subjectam Versioni Stanleiani Opera de Historia Philosoph. cap. 4. pag. 1216. Ceterum de Seneca etiam apud HIERONIMUM reperio: Scripserunt ARISTOTELES, et

PLUTARCHUS, et NOSTER SENECA, de Matrimonio libros, etc. Ubi tamen ERASMUS: nostrum vocat, quia Latinus. Quod verisimilius est. J. B.]

⁶ PLUTARCHUS diserte adfirmat, οὐκ ἔτασαν ἀρετὴν μεσότητι γίνεσθαι. Lib. De Virtute Morali, pag. 444 c. Quod quomodo intelligat et probet, videre poteris ibi, et seqq. pag. J. B.

[Et Christiani veteres] Late hoc persequitur Lactantius libro VI. institutionum, capitibus XV. XVI. XVII. Cassiodorus: non affectibus moveri, sed secundum eos moveri utile vel noxium.

trine, in which he placed the very nature of Virtue in a *medium* of the affections and actions: which having once laid down, carried him so far, that he compounded Liberality and Frugality, two very different virtues, into one virtue; and assigned to Truth, two opposites which are by no means co-ordinate, Boasting and Dissimulation; and fastened upon some things the name of vices, which either do not exist, or are not, of themselves, vices; as the contempt of pleasure, and of honour, and a lack of irascibility towards men.

44 That this foundation of virtue, [that it is the *medium* between two extremes,] is not a right one, appears from the example of Justice itself; for the *too much* and *too little* which are opposed to this, since he cannot find in the affections and the consequent actions, he seeks them in the things with which justice deals; which proceeding is, in the first place, a transition to another genus; a fault which he justly blames in others. And in the next place, to take less than is one's

pere, potest quidem adventitium habere vitium, ex eo quod quis pro rerum circumstantiis sibi ac suis debeat; at certe cum justitia pugnare non potest, quæ tota in alieni abstinencia posita est. Cui hallucinationi similis illa est, quod adulterium ex libidine, cædem ex ira proprie ad injustitiam pertinere non vult; cum tamen injustitia non aliam naturam habeat, quam alieni usurpationem; nec referat, ex avaritia illa, an ex libidine, an ex ira, an ex imprudente misericordia proveniat, an ex cupiditate excellendi, unde maximæ injuriæ nasci solent. Nam qualiacunque incitamenta contemnere hac tantum de causa, ne societas humana violetur, hoc vero justitiæ proprium est.

45 Ut redeam unde veneram, verum quidem est virtutibus nonnullis accidere, ut affectus moderentur, sed hoc non ideo quod id sit virtuti omni proprium atque perpetuum; sed quia recta ratio, quam virtus ubique sequitur, ^ε in quibusdam modum sequendum dictat, in quibusdam ad summa incitat.

*In summa
scilicet con-
stitit.*

^ε *In quibusdam modum sequendum dictat, in quibusdam ad summa incitat] Agathias libro v. in Oratione Belisarii: τῶν γὰρ τῆς ψυχῆς κινήματων, τὰ μὲν ὅσα πεφύκασι καθαρὸν ἔχειν καὶ ἀκραί- φνεις τὸ αἰρετὸν καὶ καθήκον, τούτων*

ἐντελῶς καὶ δὴ ἀνθεκτέον. οἷς δὲ μέ- τεστι καὶ τῆς πρὸς τὰναντία τροπῆς καὶ ἐκνεύσεως, τούτοις οὐ διὰ πάντων χρηστέον, ἀλλ' ἐς ὅσον ἔχουσι τὸ συμ- φέρον. τὸ μὲν οὖν φρονεῖν ἀμικρὲς ἀγα- θὸν καὶ ἀνόθεντον ἅπαντες εἶναι φή-

own, may indeed have a vice adventitiously connected with it, growing out of a consideration of what a person, under the circumstances, owes to himself and those who depend on him; but certainly cannot be repugnant to justice, which resides entirely in abstaining from what is another's. And to this mistake that other is similar, that adultery as the fruit of lust, and homicide arising from anger, he will not allow to belong properly to injustice; though injustice is nothing else in its nature than the usurpation of what is another's; nor does it make any difference whether that proceeds from avarice, or from lust, or from anger, or from thoughtless compassion; or on the other hand, from the desire of superiority, in which the greatest examples of unjust aggressions originate. For to resist all impulses on this account only, that human society may not be violated, is what is really the proper character of justice.

45 To return to the point from which I started, it is true that it belongs to the character of certain virtues, that the affections are kept in moderation; but it does not follow that this is the proper and universal character of all virtue; but that Right Reason, which virtue everywhere follows, dictates that in some things a medium course is to be followed, in others, the highest degree of the affection is to be

Nam Deum nimium colere non possumus: superstitio enim non eo peccat, quod Deum nimium colat, sed quod perverse: neque æterna bona nimium possumus appetere, neque æterna mala nimium formidare: neque peccata nimium odisse. Vere Lib. iv. 2. igitur a Gellio dictum, esse quædam quorum amplitudines nullis finibus cohibeantur, et quæ quanto majora auctioraque sint, etiam tanto laudatiora sint. Lactantius, cum multum de affectibus disseruisset, *Non in his moderandis, inquit, sapientiæ ratio versatur, sed in causis eorum; quoniam extrinsecus commoventur: nec ipsis potissimum frenos imponi oportuit, quoniam et exigui possunt in maximo crimine, et maximi possunt esse sine crimine.* Nobis propositum est Aristotelem magni facere, sed cum ea libertate quam ipse sibi in suos magistros veri studio indulsit.

46 Historiæ duplicem habent usum, qui nostri sit argumenti: nam et exempla suppeditant et judicia. Exempla quo meliorum sunt temporum ac populorum, eo plus habent auc-

στοιτε δὲν. τῆς δὲ ἀργῆς τὸ μὲν δραστή-
ριον εὐκλεές· τὸ δὲ ὑπέρμετρον φευκ-
τὸν καὶ ἀσύμφορον. Ex animi motibus
illi omnino simpliciterque arripiendi, in
quibus id, quod officio convenit eligique
dignum est, purum reperitur atque sin-
cerum. At quibus accidit, ut et in ma-

lum vergant atque declinent, his non om-
nimode utendum, sed quatenus condu-
cunt. Prudentia bonum est merum et
incorruptum, quod nemo negaverit. In
ira id, quod actuosum, laudabile: quod
modum excedit, vitandum, ut damnum
adferens. (Cap. 7.)

aimed at. Thus for instance, we cannot love God too much; for superstition does not err in this, that it loves God too much; but that its love acts perversely. We cannot desire eternal happiness too much, nor fear eternal misery too much, nor hate sin too much. It is therefore truly said by Gellius, that there are some things of which the range is not to be bounded by any limits; such that the larger and fuller they are, the more praiseworthy are they. So Lactantius, after discoursing much concerning the affections, says, *The procedure of wisdom is not shewn in moderating them, but their causes; since they arise from external incitements: nor are we to make it our business to restrain such affections, since they may be feeble in the greatest crimes, and vehement without any crime.* It is our purpose to place Aristotle very high, but with the same liberty which he allowed himself, with reference to his own master, actuated by his love of truth.

46 Passages of history are of twofold use to us; they supply both examples of our arguments, and judgment upon them with regard to examples; in proportion as they belong to better times and better nations, they have the more authority; and therefore we have preferred those taken from the Greeks and the Romans. Nor are

toritatis: ideo Græca et Romana vetera ceteris prætulimus. Nec spernenda judicia, præsertim consentientia: jus enim naturæ, ut diximus, aliquo modo inde probatur; jus vero gentium non est ut aliter probetur.

*Pœtæ.
Oratores.*

47 Poetarum et oratorum sententiæ non tantum habent pondus: et nos sæpe iis utimur non tam ut inde adstruamus fidem, quam ut his quæ dicere voluimus ab ipsorum dictis aliquid ornamenti accedat.

*II. Libri sacri.
I. Testam. vetus.*

48 Librorum, quos a Deo afflati homines aut scripserunt, aut probarunt, auctoritate sæpe utor, cum discrimine antiquæ et novæ legis. Antiquam legem sunt qui urgent pro ipso jure naturæ: haud dubie mendose; multa enim ejus veniunt ex Dei voluntate libera, quæ tamen cum vero jure naturæ nunquam pugnat: et eatenus argumentum inde recte ducitur, dummodo distinguamus accurate jus Dei, quod Deus per homines interdum exsequitur, et jus hominum inter se. Vivimus ergo, quantum potuimus, et hunc errorem, et alterum ei contrarium, qui post novi federis tempora nullum antiqui federis usum esse putat. Nos contra censemus, tum ob id

the judgments delivered in such histories to be despised, especially when many of them agree: for Natural Law, as we have said, is in a certain measure, to be proved by such consent; and as to the Law of Nations, there is no other way of proving it.

47 The opinions of poets and orators have not so much weight; and these we often use, not so much in order to claim assent to what they say, as that we may give to what we say something of ornament from their modes of expression.

48 The books written by men inspired by God, or approved by them, I often use as authority, with a distinction between the Old and the New Law. There are writers who allege the Old Law as a proof of the Law of Nature; but undoubtedly, without sufficient reason; for many parts of that Law proceed from the free will of God; which, however, is never at variance with the true Law of Nature: and so far, an argument may rightly be drawn from it; provided we distinguish accurately the Command and Will of God, which God sometimes executes by means of men, and the Rights of men towards one another. We have therefore shunned, as far as we could, both that error, and the error contrary to that, of those who think that, after the promulgation of the New Covenant, there is no longer any use for the old one. We hold the contrary; both for the reasons which we have now alleged; and because the nature of the New Covenant is such, that with relation to the precepts which are

quod jam diximus, tum quia novi federis ea est natura, ut quæ ad virtutes morum pertinentia præciuntur in veteri federe, eadem et ipsum aut majora præcipiat: et hunc in modum usos testimoniis antiqui federis videmus antiquos Christianorum scriptores.

49 Ad percipiendam autem librorum ad antiquum fedus ^{Hebræi scriptores.} pertinentium sententiam, non parum conferre nobis possunt ^hHebræi scriptores, ii maxime qui et sermones, et mores patrios habuerunt percognita.

50 Novo federe in hoc utor, ut doceam, quod non aliunde disci potest, quid Christianis liceat: quod ipsum tamen, ^{2. Testam. Nov.} contra quam plerique faciunt, a jure naturæ distinxi: pro certo habens in illa sanctissima lege majorem nobis sanctionem præcipi, quam solum per se jus naturæ exigat. Neque tamen omisi notare, si qua sunt quæ nobis commendantur magis quam præciuntur⁷, ut a præceptis declinare sciamus nefas et pœnæ obnoxium, ad summa quæque contendere generosi esse consilii, et sua non carituri mercede.

51 Synodici canones qui recti sunt, collectiones sunt ex ^{3. Synodorum canones.}

^h *Hebræi scriptores*] Ita sensit Cas-
sianus *Institutiones Divinarum Scriptu-
rarum*.

⁷ Vide, quæ monebimus infra, ad
Lib. i. c. 2. § 9. num. 4. *J. E.*

given in the Old Testament pertaining to the moral virtues, the New Testament commands the same, or greater virtues of the same kind; and we see that the ancient Christian writers have used the testimony of the Old Covenant in this manner.

49 But in order to see what is the knowledge which the books of the Old Testament contain, the Hebrew writers may help us no little; and especially those who were best acquainted with the discourses and manners of their countrymen.

50 I use the New Testament for this purpose; that I may shew, what cannot be shewn in any other way, what is lawful for Christians; which however, contrary to what most writers have done, I have distinguished from the Law of Nature: holding it for certain that in that more holy Law, a greater holiness is enjoined upon us than the Law of Nature of itself requires. Nor have I omitted to note, where there are matters which are rather recommended to us than commanded; that we may understand that to deviate from the commands is wicked, and makes us liable to punishment: to aim at the highest excellence, is the work of a nobler and more generous spirit, which will not want its reward.

51 The Synodical Canons which are authentic, are collections

4. *Christianorum primorum usus, mores.*

5. *Patrum et scripta, et consensus.*

6. *Scholastici DD.*

generalibus legis divinæ pronuntiatis, ad ea, quæ occurrunt, aptatæ; hi quoque aut monstrant, quod divina lex præcipit, aut ad id, quod Deus suadet, hortantur. Et hoc vere ecclesiæ Christianæ est officium, ea quæ sibi a Deo tradita sunt tradere et eo quo tradita sunt modo. Sed et mores apud Christianos illos veteres, et qui tanti nominis mensuram implebant, recepti, aut laudati, merito pro canonibus valent⁹. Secunda post hos auctoritas est eorum qui suis quique temporibus pietatis et doctrinæ fama inter Christianes floruerunt, neque gravis cujusquam erroris notati sunt: nam et hi quæ dicunt magna cum asseveratione, et quasi comperta, momentum non exiguum habere debent, ad interpretanda quæ obscura videntur in sacris literis; eoque majus, quo et plurium apparet consensus, et propius acceditur ad primæ puritatis tempora, cum nec dominatus adhuc nec coitio ulla primitivam veritatem adulterare potuit.

52 Qui his successerunt Scholastici, quantum ingenio

⁹ Multum abesse, ut tantum subsidii, quantum putat Auctor noster, ad hanc disciplinam excolendam, inde peti queat, paucis ostendimus in Notis Gallicis. De Patribus Ecclesiæ ex professo

egimus in Præfatione nostra ad *FUFENDORFIUM De Jure Nat. et Gent.* § 9, et 10. alterius Editionis: et forte aliquando Opere singulari, quæ ibi diximus, nos plenius exposituros, ac vindicatu-

from the general precepts of the Divine Law, adapted to special occurrences. And these either shew what the Divine Law commands, or exhort us to that which God enjoins. And this is the office of a truly Christian Church: to deliver to Christians the precepts which God has delivered to it, and in the manner in which God has delivered them.

Also the customs which were received or commanded among those ancient Christians who were truly worthy of that great name, may, with reason, have the force of Canons.

Next to these, is the authority of those who, each in his own time flourished among the Christians, with the reputation of piety and learning, and who were never charged with gross error. What these assert with great positiveness, as matters of which they are convinced, must be allowed to have no small weight in the interpretation of what is obscure in the sacred writings: and this the more, in proportion as we have the assent of a greater number, and as they approach nearer to the times of original purity, when neither the domination of one, nor the combination of several, had operated to adulterate primitive truth.

52 The Schoolmen, who succeeded them, often shew no ordinary powers of intellect; but they fell upon evil times, ignorant of

valeant, sæpe ostendunt: sed in infelici et artium bonarum ignara sæcula inciderunt: quo minus mirum si inter multa laudanda, aliqua et condonanda sunt. Tamen ubi in re morum consentiunt, vix est, ut errent: quippe perspicaces admodum ad ea videnda, quæ in aliorum dictis reprehendi possunt: in quo ipso tamen diversa tuendi studio laudabile præbent modestiæ exemplum, rationibus inter se certantes, non, qui mos nuper adeo literas inquinare cæpit, convitiis, turpi fœtu impotentis animi.

53 Juris Romani scientiam profitentium tria sunt genera. III. *Jura consulti.*
Primum eorum est, quorum opera in Pandecte, Codicibus Theodosiano et Justiniano, et in Novellis constitutionibus apparent. Secundum eos habet; qui Irnerio successerunt, Accursium, Bartolum, et tot alia nomina, quos penes diu fori regnum fuit. Tertium eos complectitur, qui humaniores literas 1. *Antiqui.*
cum legum studio conjunxerunt. Primis multum defero: nam et rationes sæpe optimas suppeditant ad demonstrandum id,

ros ab insultibus Monachi cujusdam, qui nuperrime Veterum illorum Doctorum per fas et nefas se *ὑπερασπιστήν* professus erat, jam tum significabamus, quando recensionem hanc Operis Gro-

tiani primum edidimus. [*J. B.* 1720.] Nec vana fuit promissio: quum exinde, anno 1728: prodierit Liber, Gallice scriptus, *De Doctrina Morali Patrum*, ubi fuscè rem exsequuti sumus. *J. B.*

good literature; and therefore it is the less wonderful, if, among many things which merit praise, there are some which need excuse. Yet when they agree in points of morals, they are not likely to be wrong: since they are very clearsighted in discerning what may be found fault with in the doctrines of others: while, in their mode of maintaining opposite sides of a question, they afford a laudable example of moderation; contending against each other with arguments; and not, as the custom has been of late, to the dishonour of learning, with railing and abuse, the foul offspring of ill-regulated minds.

53 Of the teachers of the Roman Law, there are three kinds: the first, those whose works appear in the Pandects, the Codex of Theodosius, and that of Justinian, and the laws called Novells. The second class contains those who succeeded Irnerius; namely Accursius, Bartolus, and so many others, who have long borne supreme sway in the Courts of Law. The third class includes those who have combined the study of elegant literature with the study of the law. For the first I have great deference; for they often supply the best reasons to prove what belongs to the nature of Jus; and give their testimony both to Natural Law and to the Law of Nations: yet

quod juris est naturæ: et eidem juri neque minus gentium juri testimonium sæpe præbent, sic tamen ut ipsi non minus quam alii nomina hæc sæpe misceant, imo et jus gentium sæpe vocent id, quod quorundam duntaxat populorum est, nec tanquam ex conducto, sed quod alii aliorum imitatione, aut fortuito receperunt. Sed et quæ vere juris sunt gentium, sæpe tractant promiscue et indiscrete cum his, quæ juris sunt Romani, ut ex titulo de captivis et postliminio apparet. Hæc ergo ut discernerentur, laboravimus.

2. *Modis.*

54 Secunda classis juris divini et historię veteris incuriosa, omnes regum populorumque controversias definire voluit ex legibus Romanis, assumtis interdum canonibus. Sed his quoque temporum suorum infelicitas impedimento sæpe fuit, quo minus recte leges illas intelligerent, satis sollertes alioqui ad indagandam æqui bonique naturam: quo factum, ut sæpe optimi sint condendi juris auctores, etiam tunc cum conditi juris mali sunt interpretes. Audiendi vero tum maxime, cum tali consuetudini, quæ nostrorum temporum jus gentium facit, testimonium perhibent.

3. *Recentiores.*

55 Tertii ordinis magistri, qui Romani juris finibus se

in such a way that they, no less than others, often confound these provinces: indeed they often call that *Jus Gentium*, the Law of Nations, which is only the law of certain peoples; and that, not even by consent, but what one nation has received by imitation of another, or by accident. Also what truly belongs to *Jus Gentium* they often treat promiscuously and indiscriminately with points which belong to the Roman Law; as appears in the titles concerning Captives, and Postliminium. We have endeavoured to keep these subjects distinct.

54 The second of these classes, regardless of divine law and of ancient history, attempted to define all the controversies of kings and peoples on the grounds of the Roman Law, sometimes taking into account the Canons. But these writers, too, were prevented, by the unhappiness of their times, from understanding those laws rightly; being, in other respects, sufficiently intelligent in investigating the nature of right and equity: whence it comes to pass, that they, while they are good authorities for making new laws, are bad interpreters of laws already made. They are to be listened to with most attention, when they give their testimony to such customs as make the Law of Nations in our time.

55 The masters of the third class, who include themselves within the limits of the Roman Law, and either never, or in a very slight

includunt, et in jus illud commune aut nunquam, aut non nisi leviter exspatiantur, vix ullum habent usum qui nostri sit argumenti. Scholasticam subtilitatem cum legum et canonum cognitione conjunxerunt, ita ut a controversiis etiam populorum ac regum non abstinerent Hispani duo Covarruvias et *Hispani.* Vasquius: hic magna libertate, modestius alter, nec sine exacto quodam judicio. Historias magis eidem legum studio inserere aggressi sunt Galli: quos inter magnum obtinent *Galli.* nomen Bodinus et Hotomanus, ille perpetuo opere, hic sparsis quæstionibus, quorum et pronuntiata et rationes sæpe nobis inquirendi veri suppeditabunt materiam.

56 In toto opere tria maxime mihi proposui: ut definiendi rationes redderem quam maxime evidentes, et ut quæ erant tractanda, ordine certo disponerem, et ut quæ eadem inter se videri poterant nec erant, perspicue distinguerem. VII.
Instituti et ordinis in universum consilium et ratio explicata.

57 Temperavi me ab his, quæ alterius sunt tractationis, ut quæ docent quid ex usu sit facere: quia ista suam habent artem specialem politicam, quam recte ita solam tractat Aristoteles, ut alieni nihil admisceat, contra quam fecit Bodinus, apud quem hæc ars cum juris nostri arte confunditur. Non-

degree, travel into that common or Natural Law, have scarcely any use in reference to our argument. They join the subtilty of the schoolmen with a knowledge of the laws and canons; so that two of them, Spaniards, Covarruvias and Vasquius, did not abstain from the controversies even of peoples and of kings: the latter, very freely; the former, more modestly, and not without shewing some exactness of judgment. The French have introduced the practice of connecting history more with the study of the law: among whom Bodin and Hotoman have a great name: the former, in the general scheme of his work; the latter, in questions scattered through the progress of his. Both the opinions and the arguments of these writers will often require our consideration, and will supply us with materials for truths.

56 In the whole course of my work I have had in view these things especially: to make my definitions and reasons as clear as I could: to arrange in due order the matters I had to treat of: and to distinguish clearly things which were really different, though they seemed identical.

57 I have refrained from discussing points which belong to another subject; as the Utility of this or that course; for these belong to a special Art, namely, the Art Political; which Aristotle rightly treats as a separate subject, mixing with it nothing of any other kind;

nullis tamen locis ejus quod utile est feci mentionem, sed obiter, et ut id ipsum a justî quæstione apertius distinguerem.

58 Injuriam mihi faciet, si quis me ad ulla nostrî seculi controversias, aut natas, aut quæ nascituræ prævideri possunt, respexisse arbitratur. Vere enim profiteor, sicut mathematici figuras a corporibus semotas considerant, ita me in jure tractando ab omni singulari facto abduxisse animum.

*Dicendi
genus con-
stitutum.*

59 Dicendi genus quod attinet, nolui ad rerum tractandarum multitudinem adjungendo verborum copiam fastidium parere lectori, cujus utilitatibus consulebam. Itaque secutus sum quantum potui concisum et docenti conveniens loquendi genus: ut tanquam in uno conspectu habeant, qui negotia publica tractant, et quæ incidere solent controversiarum genera, et principia unde dijudicari possunt: quibus cognitis facile erit ad rem subjectam accommodare orationem et quantum lubet extendere.

thus differing from Bodinus, in whom this Art is confounded with *Jus* in our sense. In some cases, however, I have made mention of the Utility of acts; but collaterally only, and in order to distinguish that question the more plainly from the question of Right.

58 The reader will do me injustice, if he judges me to have written with a regard to any controversies of our own time; either such as already exist, or such as can be foreseen as likely to arise. I profess, in all sincerity, that, as mathematicians consider their figures as abstracted from body, so did I, in treating of Rights, abstract my mind from every particular fact.

59 As to the style, I was unwilling, by adding prolixity of language to the multitude of the matters treated of, to weary the reader whom I wished to benefit. I therefore have followed a concise and didactic mode of treatment: that they who have to manage public affairs, may see, at one view, the kinds of controversies which are wont to arise, and the principles by which they are to be decided: this being known, it will be easy to accommodate their own discourses to the subject, and to expand the discussion as much as they please.

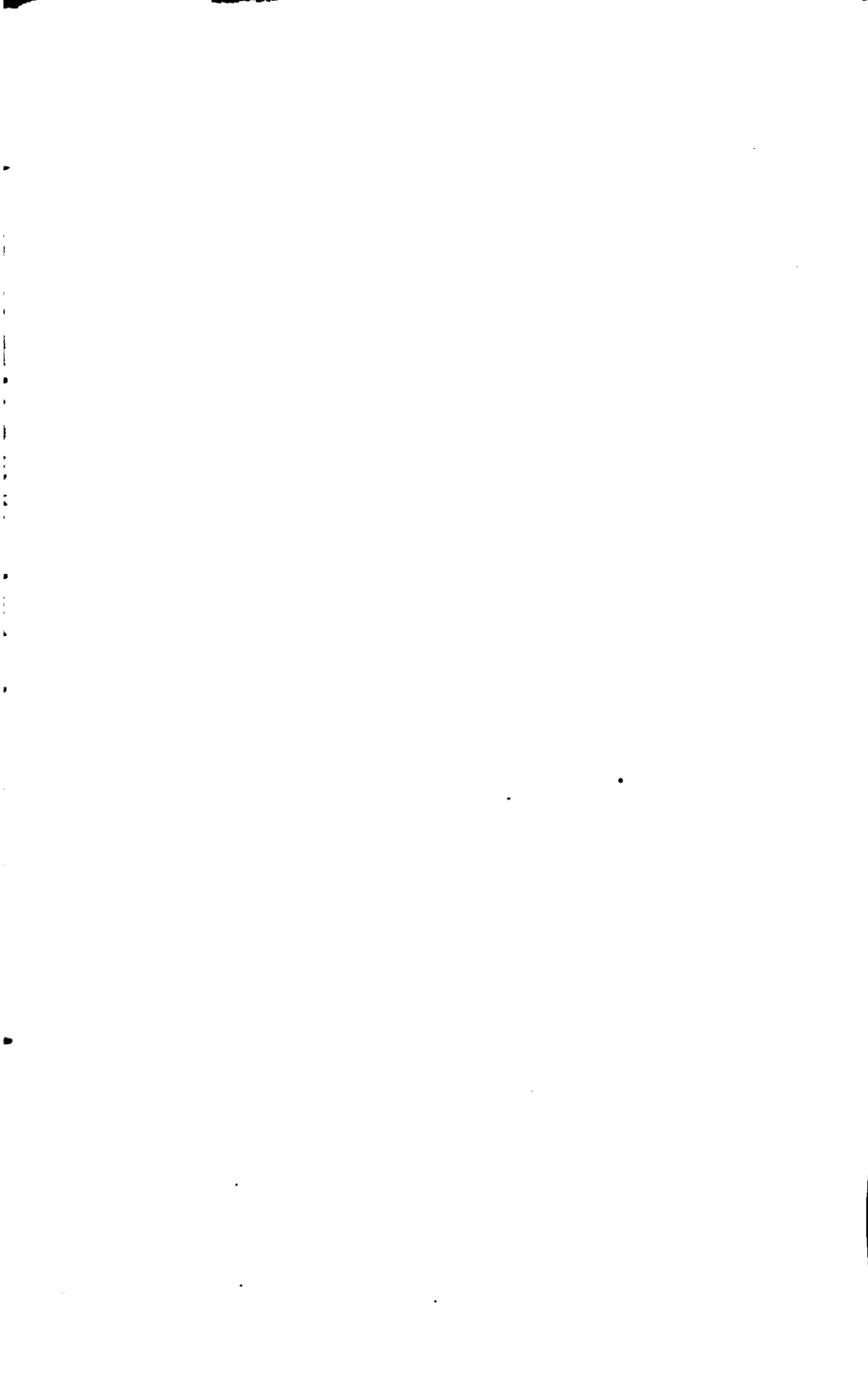
60 I have adduced the words of the authors themselves, when they were such as either carried with them authority, or exhibited especial elegance: and this I have sometimes done in Greek authors; but mostly, when either the quotation was short, or one of which I despaired of imitating the grace in a Latin translation: such a translation I have however added in every instance, for the benefit of those who find the Greek difficult.

60 Scriptorum veterum ipsa verba adduxi interdum, ubi talia erant, ut aut cum auctoritate, aut cum venustate singulari dicta viderentur: quod et in græcis feci nonnunquam, sed maxime ubi aut brevis erat sententia, aut cujus gratiam sperare non audebam latino sermone me posse assequi: quem tamen ubique adjunxi in eorum commodum qui græca non didicerunt. *Scriptorum verba ipsa.*

61 Quam vero ego in aliorum sententiis ac scriptis judicandis mihi sumsi libertatem, eandem sibi in me sumant, omnes eos oro atque obtestor, quorum in manus ista venient. Non illi promptius me monebunt errantem, quam ego monentes sequar. Et jam nunc adeo, si quid hic pietati, si quid bonis moribus, si quid sacris literis, si quid ecclesiæ Christianæ consensui, si quid ulli veritati dissentaneum a me dictum est, id nec dictum esto. *Libertas judicii lectori relicta.*

61 I beg all readers into whose hands my work may come, to take the same liberty in judging of my opinions and expressions which I have taken with regard to those of others. They cannot be more ready to admonish me when I am in error, than I shall be to attend to their admonition.

And now, if I have said anything which is at variance with sound piety, with good morals, with holy scripture, with the unity of the Christian Church, with truth in any form;—let that be as unsaid.



HUGONIS GROTHII

DE JURE BELLI AC PACIS.

LIBER PRIMUS.

CAPUT I.

QUID BELLUM, QUID JUS.

- | | |
|--|--|
| <p>I. <i>Ordo operis.</i></p> <p>II. <i>Belli definitio, et origo nominis.</i></p> <p>III. <i>Jus pro attributo actionis describitur, et dividitur in Rectitorium et Æquatorium.</i></p> <p>IV. <i>Jus pro qualitate dividitur in facultatem et aptitudinem.</i></p> <p>V. <i>Facultatis sive juris strictæ dicti divisio in potestatem, dominium, creditum.</i></p> <p>VI. <i>Facultatis alia divisio: in vulgarem et eminentem.</i></p> <p>VII. <i>Aptitudo quid?</i></p> <p>VIII. <i>De justitiæ expletrice et attributrice: easque proprie non distingui per proportionem Geometricam et Arithmeti-
cam: nec quod hæc circa res communes, illa circa res singulorum versetur.</i></p> <p>IX. <i>Jus pro regula definitur, et dividitur in naturale et voluntarium.</i></p> | <p>X. <i>Juris naturalis definitio, divisio, et distinctio ab his quæ non proprie sic dicuntur.</i></p> <p>XI. <i>Instinctum cum aliis animantibus communem, aut proprium hominibus, non facere aliam juris speciem.</i></p> <p>XII. <i>Quomodo probetur jus naturale.</i></p> <p>XIII. <i>Juris voluntarij divisio in humanum et divinum.</i></p> <p>XIV. <i>Jus humanum dividitur in civile, civili arctius, et civili latius, quod est jus Gentium: ejus explicatio, et quomodo probetur.</i></p> <p>XV. <i>Jus divinum dividitur in universale et unius populi proprium.</i></p> <p>XVI. <i>Jure Hebræorum nunquam obligatos fuisse alienigenas.</i></p> <p>XVII. <i>Quæ argumenta Christiani petere possint ex lege Hebræa, et quomodo.</i></p> |
|--|--|

I. **C**ONTROVERSIÆ eorum quos nulla juris civilis tenet communio, quales sunt et qui in gentem nondum coierunt, et qui inter se diversarum sunt gentium, tum

CHAPTER I. *What is War; What are Rights?*

I. [Questions of Rights among citizens of the same State are settled by the instituted Law of the State; and therefore do not belong to our subject, which is, Rights by nature, not Rights by institution.]

Between persons who are not bound by a common instituted Right, as those who have not yet formed a State; or between those

¹privati, tum Reges ipsi, quique par Regibus jus obtinent, sive illi optimates sunt, sive populi liberi, aut ad belli, aut ad pacis tempora pertinent. Sed quia bellum pacis causa suscipitur, et nulla est controversia unde non bellum oriri possit, occasione bellici juris, quæcunque tales incidere solent controversiæ, recte tractabuntur: ipsum deinde nos bellum ad pacem, ut finem suum, deducet.

II. 1 De Belli ergo jure acturi, videndum habemus, quid bellum sit, de quo quæritur: quid jus, quod quæritur. Cicero dixit Bellum certationem per vim. Sed usus obtinuit, ut ^anon actio, sed status eo nomine indicetur, ita ut sit Bellum status per vim certantium, qua tales sunt: quæ generalitas omnia illa bellorum genera comprehendit, de quibus agendum deinceps erit: neque enim privatum hic excludo, ut quod reipsa prius sit publico, et haud dubie cum publico communem habeat naturam, quæ propterea uno eoque proprio nomine signanda est.

¹ Scilicet ubi in loco, qui nullius est, aliquid negotii inter se habent. Vide infra, II. § 5. n. 3. J. B.

^a Non actio, sed status] Philo, II. De Legibus Specialibus [p. 790]: ὥσπερ γὰρ οἶμαι πολέμιους οὐ μόνον τοὺς ἤδη ναυμαχοῦντας ἢ πεζομαχοῦντας νομιστέον, ἀλλὰ καὶ τοὺς εἰς ἐκάτερον παρεσκευασμένους, καὶ τὰς ἐλεπόλεις ἐφιστάντας τοῖς λιμέσι καὶ τείχεσι, καὶ μὴ συμπλέκονται, κρί-

νομεν. Hostes non soli existimantur, qui jam navali aut terrestri prælio certant, sed pro talibus habendi et qui machinas admovent portubus aut mœnibus, etiam si nondum pugnam incipiunt. Servius ad illud primæ Æneidos, [v. 545]

nec bello major et arma.

Bellum et consilium habet: arma tantum in actu ipso sunt. Idem ad VIII. [v. 547] Bellum est tempus omne,

who belong to different States—whether private persons, or kings, or those whose mutual Rights [and Obligations] resemble those of kings, such as Rulers of peoples, or free Peoples themselves—questions of Rights pertain either to time of war or time of peace. But war is undertaken for the sake of peace; and, on the other hand, there is no question of Rights which may not issue in war: hence we shall begin by Rights in war, or, as they are termed, Rights of War: and the consideration of War will lead us to the consideration of Peace, the end of war.

II. 1 We have then to treat of War, and of the Rights of War. We must then ask, What is War? What are Rights?

Cicero says that War is a contest or contention carried on by force. But usage applies the term, not to an action, [a contest,] but to a state or condition: and thus we may say, War is the state of persons contending by force, as such.

2 Neque hujus nominis origo repugnat; est enim bellum ex voce veteri duellum, ut duonus quod fuerat factum est bonus, et dvis bis. Duellum autem a duobus dictum simili sensu, quo pacem unitatem dicimus. Sic Græcis ex multitudinis significatione πόλεμος: veteribus etiam λύη a dissolutione, quomodo et corporis dissolutio ²δύη.

(Cicero Orat. c. xlv; Quintil. Inst. Orat. l. 4.)

3 Neque usus ³vocis laxiorem hanc notionem repudiat. Quod si quando belli nomen publico tantum tribuitur, nihil id nobis obstat, cum certissimum sit, nomen generis sæpe speciei, præsertim excellentiori, peculiariter adherescere. Justitiam in definitione non includo, quia hoc ipsum in hac disputatione quærimus, sitne aliquod bellum justum, et quod bellum justum sit. Distingui autem debet id, quod quæritur, ab eo de quo quæritur.

III. 1 De jure belli cum inscribimus hanc tractationem, primum hoc ipsum intelligimus, quod dictum jam est, sitne bellum aliquod justum, et deinde quid inb ello justum

quo vel præparatur aliquid pugnae necessarium, vel quo pugna geritur. Præbellum autem dicitur conflictus ipse bellorum.

² Vid. e. g. Horat. Sat. i. 8. 107; Terent. Eun. Act. i. Sc. 1. v. 18. J. B.

³ Ita habent omnes Edd. et nihil mutandum. In animo habuit etymologiam vocis λύπη a PLATONE traditam, ἀπὸ τῆς διαλύσεως τοῦ σώματος, ἣν ἐν τοῦτοις τῷ πάθει ἴσχει τὸ σῶμα. In

Cratyl. p. 419. Ad hoc exemplum, τὸ Δύη, quod inter alia, per λύπη exponitur, Auctor noster, veteris Philosophiæ placitis innutritus, secundum quam Dolor est solutio continui, ἀπὸ τοῦ δύνω deduxit: dissolutionem partium corporis ita opponens dissolutioni seu dissidio animorum, quod innuit vox Λύη, nullibi, quod quidem sciam, alio sensu usurpata. J. B.

Hence we do not exclude *private** wars, which preceded public wars, and have the same origin as those.

2 The name, (*Bellum*,) comes from an old word *Duellum*, and implies the separation of two, (*duo*;) as peace is *unity*, when two are made one. So the Greek πόλεμος from πολύς, *many*.

3 The common use of the word *War* allows us to include Private War, though, used generally, it often means specifically *public* War.

We do not say that war is a state of *just* contention, because precisely the point to be examined is, Whether there be just war, and What war is just. And therefore we must distinguish the subject, War, from the question which we examine concerning it.

III. 1 By entitling our Treatise, *Of the Rights of War*, we

* In including *private*, and excluding *just*, in his definition of war, G. seems to have in view the definition of Albericus Gentilis; "Bellum est contentio, publica,

De Officiis,
iii. 5.

L. ut vim 3.
D. de Just. et
Jur.
De Ira. ii.
31.

Ethic. Nic.
viii. 8.

sit? Nam jus hic nihil aliud quam quod justum est significat, idque negante magis sensu quam aiente, ut jus sit quod injustum non est. Est autem injustum, quod naturæ societatis ratione utentium repugnat. Sic alteri detrahere sui commodi causa, contra naturam esse dicit Cicero, atque ita probat, quia si id fiat, societas hominum et communitas evertatur necesse sit. Hominem homini insidiari nefas esse, evincit Florentinus, quia cognationem quandam inter nos constituerit natura. Seneca: *ut omnia inter se membra consentiunt, quia singula servari totius interest; ita homines singulis parcent, quia ad cætum geniti sumus.* ^b *Salva enim esse societas nisi amore et custodia partium non potest.*

2 Sicut autem societas ^c alia est sine inæqualitate, ut inter fratres, cives, amicos, fœderatos: alia inæqualis, καθ' ὑπεροχὴν Aristoteli, ut inter patrem et liberos, dominum et servum, regem et subditos, ^d Deum et homines: ita justum aliud est ex æquo inter se viventium, aliud ejus qui regit et

^b *Salva enim esse societas nisi amore et custodia partium non potest* Seneca idem ep. xviii: *Hæc societas diligenter et sancte dolenda est, quæ nos omnes omnibus miscet, et judicat aliquod esse commune jus generis humani. Videri potest hac de re Chrysostomus, 1 Cor.*

xi. 1. [Tom. III. p. 405, 406.]

^c *Alia est sine inæqualitate* Ut in Grammaticis alia constructio convenientia, alia regiminis.

^d *Deum et homines* De hac societate vide Philonem in ἐξένηψε Νοῦς (pag. 281, 282. Ed. Paris.) Habet et Plutar-

mean, in the first place, to imply the discussion of the questions just stated, Whether any war is just, and What is just in war. For *Rights, Jus*, in this case, means only what is right, that is, just; and that, rather with a negative than a positive sense; so that *that* comes within the substantive *Right*, which is not unjust, or wrong.

That is unjust which is contrary to the nature of a society of rational creatures. Cicero, Seneca, Florentinus, reason on the ground of man being intended by nature for society. [See the quotations.]

2 Society is either that of equals, as brothers, friends, allies; or it is unequal, as that of parent and child, master and servant, king and subjects, God and men: and what is just, is different in the two cases. We may call them respectively Equatorial Rights and Rectorial Rights.

IV. *Jus, Right*, has another signification, derived from the former, as when we say *my Right*. In this sense *Right* is a moral Quality by

armata, justa." For reasons for preferring the latter definition, see *Elements of Morality*, Art. 1068. The rights of War, as understood in modern times, exclude private wars, or wars among subjects, and include the *assertion* of justice. If they did not, there would be no question of *Rights*. W. W.

qui regitur, qua tales sunt: quorum hoc jus Rectorium, illud Æquatorium recte, ni fallor, vocabimus.

IV. Ab hac juris significatione diversa est altera, ⁴sed ab hac ipsa veniens, quæ ad personam refertur: quo sensu jus est Qualitas moralis personæ competens ad aliquid juste habendum vel agendum. Personæ competit hoc jus, etiamsi rem interdum sequatur, ut servitutes prædiorum, quæ jura realia dicuntur, comparatione facta ad alia mere personalia; non quia non ipsa quoque personæ competant, sed quia non alii competunt, quam qui rem certam habeat. Qualitas autem moralis perfecta, facultas nobis dicitur; minus perfecta, aptitudo: quibus respondent in naturalibus, illi quidem actus, huic autem potentia.

V. Facultatem Jurisconsulti nomine sui appellant, nos posthac jus proprie aut stricte dictum appellabimus: sub quo continentur potestas, tum in se, ⁵quæ libertas dicitur, tum in alios; ut patria, dominica: ⁶Dominium, ⁷plenum sive minus

chus quædam in Numa [pag. 62. Potuisset Auctor addere locum Ciceronis longe luculentiorum et aptiorum, quem reperies *De Legib.* Lib. 1. cap. 7, *J. B.*]

⁴ Confer PUFENDORF. *De Jur. Nat.* et *Gent.* Lib. 1. cap. 1, § 19, 20. *J. B.*

⁵ Quæ libertas dicitur] Quam prop-

terea facultatis nomine optime definiunt Romani Jurisconsulti.

⁶ *Dominium*] *Jus pro Dominio*, Scholiastes ad Horatium. [Vid. II. Ep. 2. 174. et II. Sat. 3. 217. *J. B.*]

⁷ Confer PUFENDORF. *De Jure Nat.* et *Gent.* Lib. IV. cap. 4, § 2. *J. B.*

which a person is competent to have or to do a certain thing justly.

Right in this sense belongs to a person, though sometimes it follows a thing: as one piece of land may have a right of way, or other easement, over another piece of land. In this case the Right still belongs to a person, namely, to the person who possesses the first piece. Such Rights are called *real* Rights in comparison with others which are merely personal.

This moral quality, when perfect, is called *facultas*, a jural claim; when less perfect, *aptitudo*, a fitness, or moral claim.

V. A Jural Claim, belonging to any one, the jurists call *sum*, his own thing. We shall call this hereafter a *Right* strictly speaking, or a *Right proper*.

It includes, Power; whether over one's self, which is Liberty;

or over another, which is Authority, for example, paternal, dominical (that of a master over a servant);

Ownership; whether full, as of Property;

or less full, as of Compact, Pledge, Credit, to which corresponds Debt on the other side.

pleno, ut ususfructus, jus pignoris: et creditum, ⁶cui ex ad-verso respondet debitum.

VI. Sed hæc facultas rursum duplex est: vulgaris scilicet, quæ usus particularis causa comparata est; et eminens, quæ superior est jure vulgari, utpote communitati competens in partes et res partium, boni communis causa. Sic regia potestas sub se habet et patriam et dominicam potestatem: sic ⁷in res singulorum majus est dominium Regis ad bonum commune, quam dominorum singularium: sic reipublicæ quisque ad usus publicos magis obligatur, quam creditori.

Nicom Lib. v.
cap. vi.

VII. Aptitudinem vero ⁸ἁξίαν, id est dignitatem vocat Aristoteles. Michaël Ephesius, id quod secundum eam æquale dicitur, interpretatur τὸ προσαρμόζον et τὸ πρέπον, id quod convenit.

VIII. 1 Facultatem respicit justitia expletrix, quæ proprie aut stricte justitiæ nomen obtinet, συναλλακτικὴ Aristo-

⁶ Voces *Creditum* et *Debitum*, non tantum spectant, ex mente auctoris, id quod ex qualibet causa, etiam ex delicto, debetur, L. II. 12. D. *De verb. et rerum signif.* (vid. infr. Lib. II. cap. 4, § 2, et cap. 17, § 1). Sed etiam *jus puniendi*, et *obligationem ad penam*, hæc complectuntur. Vid. Prolegom. § 8. in fin. et Lib. III. cap. 13. § 1, 2. J. B.

⁸ In res singulorum majus est dominium regis] Philo, περὶ φευρουρίας. [p. 222.] καὶ μὲν ἀργυρὸς τε καὶ χρυσὸς καὶ ὅσα ἄλλα κειμήλια παρὰ τοῖς ἀρχομένοις θησαυροφυλακεῖται, τῶν ἡγουμένων μᾶλλον ἢ τῶν

ἔχόντων ἐστίν. Certe argentum, aurum, et quæ pretiosa alia apud subditos custodiuntur, eorum qui regnant magis sunt quam possidentium. Plinius, *Panegyrico* [cap. 27]: *cujus est quidquid est omnium, tantum ipse, quantum omnes, habet.* Et mox: *Ecquid Cesar non suum videat?* [cap. 50. qui locus tamen male addertur et aptatur. J. B.] Adde *Sarisberiensem*, in *Politratico*, Lib. VI. c. I. [p. 335.]

⁷ ἁξίαν] Cicero, *de Officiis*, I. [cap. 17]: *Sed si contentio quædam et comparatio fiat, quibus plurimum tribuendum officii, principes sint, patria, et paren-*

VI. But this Right is again twofold: Vulgar, which exists for the purpose of private use; and Eminent, which is superior to vulgar Right, and is the Right which the community has over persons and things for the sake of the common good.

Thus the Royal authority has under it the paternal and dominical. So the power of ownership of the Sovereign over private property for the common good is greater than that of the private owners: so every one is more bound to the state in regard to public uses than to his private creditor.

VII. A Fitness is what Aristotle calls *ἁξίαν*, a moral claim.

VIII. 1 A Jural Claim, or Right proper, belongs to Expleatory Justice, or Justice proper. This is what Aristotle calls *Contractual*

teli, nimis arcto vocabulo, nam ut possessor meæ rei eam mihi reddat, non est ἐκ συναλλάγματος, et tamen ad eandem hanc justitiam pertinet: itaque ἐπανορθωτικὴν idem felicius dixit. Aptitudinem respicit attributrix, quæ Aristoteli διανεμητική, comes earum virtutum, quæ aliis hominibus utilitatem adferunt, ut liberalitatis, misericordiæ, providentiæ rectoris.

2 Quod vero idem Aristoteles ab expletrice ait respici proportionem simplicem, quam ἀριθμητικὴν vocat; ab attributrice autem comparatam, quam γεωμετρικὴν appellat, quæ sola apud Mathematicos ¹ nomen habet proportionis; ex eorum genere est quæ sæpe locum habent, non semper: neque vero per se justitia expletrix ab attributrice differt tali proportionum usu, sed materia circa quam versatur, ut jam diximus. Itaque et contractus societatis expletur proportionem comparata, et si unus tantum aptus inveniatur ad munus publicum, non alia quam simplici commensione attributio fiet.

tes, quorum beneficiis maxime obligati sumus; proximi liberi, totaque domus, quæ spectat in nos solos, neque aliud ullum potest habere periculum, deinceps bene convenientes propinqui, quibuscum etiam communis plerumque fortuna est: quamobrem necessaria præsidia vitæ debentur iis maxime, quos ante dixi. Vita autem victusque communis, consilia, sermones, cohortationes, consolationes, interdum etiam objurgationes in amicitia vigent maxime. Vide quæ infra dicentur Lib. II. cap. VII. § 9 et 10. Seneca, De Benef. IV. c. II. ubi de testamentis agit: Querimus dignissimos, quibus nostra

tradamus, ipsum locum vide. Adde Augustinum, De Doctr. Christ. I. c. XXVIII, XXIX.

¹ *Nomen habet proportionis*] Habitudinis comparisonem vocat Cassiodorus. [Locus exstat in Lib. De Dialectic. pag. 408. In proportionem, inquit, non est similitudo rerum, sed quædam HABITUDINIS COMPARATIO. J. B.] Est hujus proportionis, qua Justitia attributrix uti solet, non incommoda apud Homerum descriptio. [Iliad. XIV. 382].

Ἐσθλὰ μὲν ἐσθλὸν δοῦναι, χεῖρα δὲ χεῖρονι δοῦναι.

Præstanti dabit hic præstantia, villa villi.

Justice; but the term is too narrow; for that the possessor of my thing should restore it to me is not a matter of contract; and yet it belongs to this division. Elsewhere he calls it by a better name, Corrective Justice.

A Moral Claim [sometimes called an Imperfect Right] belongs to Attributive Justice, which Aristotle calls Distributive Justice, the companion of the virtues which are useful to our neighbours, as liberality, mercy, directive prudence.

2 Aristotle says that Expletory Justice proceeds by arithmetical proportion, Attributive, by geometrical proportion; but this is not always true. The two differ, not in their rules, but in the matter about which they are concerned. A contract of partnership is ruled

3 Neque magis verum est quod a nonnullis dicitur, attributricem versari circa res communes, explettricem circa res singulorum. Contra enim si quis de re sua legare velit, attributrice justitia uti solet: et civitas quæ de communi reddit, quod civium quidam in publicum impenderunt, nonnisi explettricis justitiæ officio fungitur. Recte hoc discrimen notatum a Cyri magistro: nam cum Cyrus puero minori minorem tunicam, sed alienam, attribuisset, et majori contra majorem, docuit eum magister: ὅτι ὁπότε μὲν κατασταθεῖν τοῦ ἀρμόττοντος κριτῆς, οὕτω δέοι ποιεῖν. ὁπότε δὲ κρίναι δέοι ὁποτέρου ὁ χιτῶν εἴη, τοῦτο σκεπτέον τίς κτήσις δικαία ἐστὶ: πότερα τὸν βίᾳ ἀφελόμενον ἔχειν, ἢ τὸν ποιησάμενον ἢ πριάμενον κεκτῆσθαι; *Tunc quidem ubi constitutus esset arbitrator ejus quod cuique conveniret, ita agendum esse; at ubi judicandum esset utrius esset tunica, id spectandum*^k *utra possessio justior, eumne rem habere qui vi abstulisset, an qui fecisset aut emisset.*

[ap. Xenoph.
Cyr. Lib. i.
cap. iii. § 14
J. B.]

IX. 1 Est et ¹tertia juris significatio, quæ idem valet

⁷ Respicit hic Auctor ad locum Aristotelis, *Ethic. Nicom.* v. 7, de quo in Notis Gallicis egimus, et in eo philosophum non satis recte ratiocinari, ostendimus. J. B.

^k *Utra possessio justior*] Vide eundem Xenophontem *παιδείας* secundo. Huc spectat lex per Moysen data: *non miseraberis in judicio pauperis.* Exod. xxiii. 3; Levitic. xix. 5. Oportet enim, ut Philo ait, τὰ πράγματα ἀφέλκειν τῆς τῶν δικαζομένων φαντασίας, *res abstrahere a litigatorum respectu.* [Locus Phi-

lonis legitur in Lib. *de Judiciis*, pag. 720. Apud Xenophontem vero, quod huc faciat, nil reperio, nisi quod videre poteris cap. ii. Libri indicati, § 10, 11. J. B.]

¹ *Tertia juris significatio quæ idem valet quod lex*] Hoc sensu dixit Horatius [1. Sat. iii. 211]:

Jura inventa metu injusti fateri necesse est.
Et alibi: *Jura neget sibi nata.* [Art. Poet. vers. 122]. Ubi scholiastes: *legum sit contemtor.*

⁸ Vide PUFENDORF. *De Jure Nat.*

by expletory justice, but according to geometrical proportion; if there is only one person fit for an office, it is by attributive justice given to him alone, instead of reckoning proportion.

3 Equally erroneous is what others say, that Attributive Justice concerns things common or public; Expletory, private possessions. For if a man bestow his private property in legacies, he uses attributive justice; and the state, in paying what it owes to private citizens, uses expletory justice*.

See the story in the *Cyropædia*, in which Cyrus is blamed for giving

* The remarks in the text go far to prove that the distinction of Contractual, Corrective, or Expletory justice, on the one hand, from Attributive Justice on the other, is not tenable. W. W.

quod lex, quoties vox legis largissime sumitur, ut sit regula actuum moralium obligans ad id quod rectum est. Obligationem requirimus: nam consilia, ⁸ et si qua sunt alia præscripta, honesta quidem, sed non obligantia, legis aut juris nomine non veniunt. Permissio autem proprie non actio est legis, ⁹ sed actionis negatio, nisi quatenus alium ab eo cui permittitur obligat ne impedimentum ponat. Diximus autem, ad rectum obligans, non simpliciter ad justum, quia ^mjus hac notione, non ad solius justitiæ, qualem exposuimus, sed et aliarum virtutum materiam pertinet. Attamen ab hoc jure, quod rectum est, laxius justum dicitur.

2 Juris ita accepti optima partitio est, quæ apud Aristotelem exstat, ¹ ut sit aliud jus naturale, aliud voluntarium, quod ille legitimum vocat, legis vocabulo strictius posito: interdum et τὸ ἐν τάξει, constitutum. Idem discrimen apud Hebræos reperire est, ² qui cum distincte loquuntur, jus naturale vocant ^aצדק, jus constitutum דין, quorum illud δίκαιώματα, hoc ἐντολὰς solent vertere Hellenistæ.

et Gent. Lib. 1. cap. vi. § 1. J. B.

⁸ Permissionem non esse meram actionis negationem, a parte Legis, ostendimus ad PUFENDORF. Lib. 1. cap. vi. § 15. Not. 2, et de ea re plenius egimus in Notis Gallicis ad hunc Grotii nostri locum. J. B.

^m Jus hac notione, etc.] Exemplum sit in Zaleuci lege, pœnam irrogante ei qui contra Medici præceptum vinum bibisset. [Habet ex ÆLIANO, Var. Hist. II. 37. Adde Notam Perizonii in III. 34. ejusdem Auctoris. J. B.]

¹ In Ethic. ad Nicom. Lib. v. cap. x. Sed utrumque, secundum Philosophum, partem facit Juris Civilis, quod vocat Δίκαιον Πολιτικόν, ut ea, de quibus agitur, Δίκαιον Φυσικόν, et Δίκαιον Νομικόν. Adeoque paullo aliter divisio Auctoris nostri sese habet. J. B.

² Hoc discrimen non semper observari, ipse auctor fatetur, in Adnotat. ad Luc. I. 6; Vide et Clar. Clericum, in Genes. xxvi. 5. J. B.

^a צדק ודין. Sic Maimonides Libro III. ductoris dubitantium cap. xxvi.

the big boy the larger coat, which belonged to the little boy: because his business was expletory, not attributive justice.

IX. 1 Jus has a third signification, meaning Law in its largest sense, namely, "a Rule of moral acts obliging to what is right."

"Obliging" is necessary to this signification: for mere Counsel or Advice is not included in Jus or Law; and Permission is not Law, but the absence of Law, except so far as it obliges other persons not to impede.

"Obliging to what is right," not to what is just; for Jus in this signification does not include strict Justice merely, but the matter of other virtues. Yet what is right is sometimes loosely called just.

2 The best distinction of Law in this general sense, is that of Aristotle, into Natural Law, and Voluntary or Legal Law [or Positive

X. 1 ^oJus naturale est dictatum rectæ rationis, indicans actui alicui, ex ejus convenientia aut inconvenientia cum ipsa natura rationali ac ³sociali, inesse moralem turpitudinem, aut necessitatem moralem, ac consequenter ab auctore naturæ Deo talem actum aut vetari, aut præcipi.

2 Actus de quibus tale exstat dictatum, debiti sunt aut illiciti per se, ⁴atque ideo a Deo necessario præcepti aut vetiti intelliguntur: qua nota distat hoc jus non ab humano tantum jure, sed et a divino voluntario, quod non ea præcipit aut vetat quæ per se ac suapte natura aut debita sunt, aut illicita, sed vetando illicita, præcipiendo debita facit.

3 Ad juris autem naturalis intellectum, notandum est,

^o *Jus naturale est dictatum rectæ rationis*] Philo libro, omnem virum bonum esse liberum; Νόμος δὲ δψευδὴς ὁ ὀρθὸς λόγος, οὐχ ἐπὶ τοῦ δέινου, ἢ τοῦ δέινου θνητοῦ, φθαρτοῦ, οὐκ ἐν χαρτιδίῳ ἢ στηλαῖς δψυχος δψύχοις, ἀλλ' ἐπ' ἀθανάτου φύσεως, ἀφθαρτος, ἐν ἀθανάτῳ διανοίᾳ τυπωθεὶς. *Lex mentiri nescia est recta ratio, quæ lex, non ab hoc aut illo mortali mortalis, non in chartis aut columnis exanimis exanima, sed corrumpi nescia, quippe ab immortalis natura insculpta in immortalis intellectu.* [Pag. 871, B.] Tertullianus *de Corona Militis*: [cap. vi.] *Quæres igitur Dei legem, habens communem istam in publico mundi, in naturalibus tabulis.*

M. Antoninus, Lib. II. τέλος λογικῶν ζώων, τὸ ἔπεσθαι τῇ τῆς πόλεως καὶ πολιτείας τῆς πρεσβυτάτης λόγῳ καὶ δεσμῷ. [§ 16]. *Finis animantium ratione utentium, sequi legem ac normam civitatis ac reipublicæ omnium antiquissimæ.* Adde Ciceronis locum *de Republica* III. quem adducit Lactantius VI. 8. Præclara sunt quæ in hanc rem habet Chrysostomus XII, XIII. de statu. Nec spernenda quæ Thomas Secunda Secundæ LVII. 2. et Scotus III. dist. 37.

³ Voces illas, *ac sociali*, quamquam in omnibus Edd. desint, confidenter addidimus, Auctorem ipsum ducem sequuti, qui infra § 12, num. 1. eas habet, et heic a Typographis omisæ facile

Law; δίκαιον φυσικὸν and δίκαιον νομικὸν, *Eth. Nicom.* v. 10.] or Instituted Law, τὸ ἐν τάξει. The Hebrew has a like distinction.

X. 1 Natural Law is the Dictate of Right Reason, indicating that any act, from its agreement or disagreement with the rational [and social*] nature [of man] has in it a moral turpitude or a moral necessity; and consequently that such act is forbidden or commanded by God, the author of nature.

2 Acts concerning which there is such a Dictate are obligatory, [morally necessary,] or are unlawful, in themselves, and are therefore understood as necessarily commanded or forbidden by God; and in this character, Natural Law differs, not only from Human Law, but from Positive Divine Law, which does not forbid or command acts which, in themselves and by their own nature, are either obligatory or

* Added by Barbeyrac, from what follows XII. 1. See also above, III. 1.

quædam dici ejus juris non proprie, sed ut scholæ loqui amant, reductive, quibus jus naturale non repugnat, sicut justa modo diximus appellari ea quæ injustitia carent: interdum etiam per abusionem ea, quæ ratio honesta, aut oppositis meliora esse indicat, etsi non debita, solent dici juris naturalis.

4 Sciendum præterea, jus naturale non de iis tantum agere quæ citra voluntatem humanam existunt, sed de multis etiam quæ voluntatis humanæ actum consequuntur. Sic dominium, quale nunc in usu est, voluntas humana introduxit: at eo introducto nefas mihi esse id arripere te invito quod tui est domini, ipsum indicat jus naturale; quare ^pfurtum naturali jure prohibitum dixit Paulus Jurisconsultus, natura turpe

potuit non animadvertere; ut in aliis locis, ubi res majoris adhuc momenti erat, id ei accidisse, ostendemus. *J. B.*

¶ Verum quidem est, Deum non potuisse, salva sapientia sua, actus, qui heic vocantur *debiti*, vetare, aut contrarios præcipere. Attamen vinculum ipsum *Obligationis*, qua quis tenetur illos exercere, ab his abstinere, non ex ipsa natura actuum oritur, sed a *voluntate* Dei, quatenus est Auctor naturæ rerum, et summus Hominum Legislator. Adeoque, accurate loquendo, tales actus non possunt dici *per se* debiti, aut illiciti. Qua de re aliquid diximus in Præfatione Gallica ad PUFENDORF. *De Jure Nat. et Gent.* pag. 66, secundæ Edit. et nu-

perrime egimus fuse satis in examine *Judicii* illustris LEIBNITII, subjecto quartæ Editioni versionis nostræ Libelli *De Offic. Hom. et Civ. J. B.*

¶ *Furtum naturali jure prohibitum*] Julianus: ὁ δεύτερος νόμος (post illum de Deo agnoscendo et colendo) ἱερὸν φύσει καὶ θεῖον, ὁ τῶν ἀλλοτρίων πάντα καὶ πάντως ἀπέχεσθαι κελεύων· καὶ μήτε ἐν λόγῳ, μήτε ἐν ἔργῳ, μήτε ἐν αὐταῖς ταῖς λαμβανούσαις τῆς ψυχῆς ἐνεργείαις ταῦτα ἐπιτρέπων συγχεῖν. [*Orat.* VII. pag. 209. C. D. *Lex altera et ipsa suapte natura sancta atque divina ea est, quæ semper et ubique alienis abstinere jubet, neque vero aut verbo, aut facto, aut arcanis animi*

unlawful; but, by forbidding them makes them unlawful, by commanding them makes them obligatory.

3 In order to understand Natural Law, we must remark that some things are said to be according to Natural Law, which are not so properly, but, as the schools love to speak, reductively, Natural Law not opposing them; as we have said [III. 1] that some things are called just, which are not unjust. And again, by an abuse of expression, some things are said to be according to Natural Law which reason shews to be decent, or better than their opposites, though not obligatory. [As monogamy is better, though we cannot strictly say that polygamy is contrary to Natural Law. Concerning the use of the term *Natural Law*, or *Law of Nature*, in such cases, see *E. M.* 1064.]

4 It is to be remarked also that Natural Law deals not only with things made by nature herself, but with things produced by the act

L. 1. D. de
Furtis. L.
Probrum, 42.
D. de verb.
significat.

Ulpianus, Deo displicere Euripides his in Helena versibus :
(909, et seqq.)

Namque odit ipse vim Deus : nec divites
Nos esse rapto, sed probe partis cupit.
Spernenda, si non jure veniat, copia est.
Communis æther hominibus, tellus quoque,
In qua ampliare cuique sic fas est domum,
Ut ab alienis rebus ac vi temperet.

5 Est autem jus naturale adeo immutabile, ⁵ut ne a Deo quidem mutari queat. Quanquam enim immensa est Dei potentia, dici tamen quædam possunt, ad quæ se illa non extendit ; quia quæ ita dicuntur, dicuntur tantum, sensum autem qui rem exprimat nullum habent, sed sibi ipsis repugnant. Sicut ergo ut bis duo non sint quatuor ne a Deo quidem potest effici, ita ne hoc quidem, ut quod intrinseca ratione malum est, malum non sit. Et hoc est quod significat Aristoteles, cum dicit *ἔνια εὐθὺς ὠνόμασται συνειλημμένα μετὰ τῆς φαυλότητος*. Nam ut esse rerum postquam sunt et qua sunt aliunde non pendet, ita et proprietates, quæ esse illud necessario consequuntur, talis autem est malitia quorundam actuum, comparatorum ad naturam sana ratione utentem. Itaque et Deus ipse secundum hanc normam de se judicari

cogitationibus contrarii sinit. Cicero, de Officiis III. [c. 10] ex Chrysippo : In vita sibi quæque petere quod pertineat

ad usum, non iniquum est : alteri surripere, jus non est.

of man. Thus property, as it now exists, is the result of human will : but being once introduced, Natural Law itself shews that it is unlawful for me to take what is yours against your will. And thus Paulus says that theft is prohibited *naturali jure* ; Ulpian says that it is *natura turpe*, bad by nature : Euripides says it is displeasing to God.

5 Natural Law is so immutable that it cannot be changed by God himself. For though the power of God be immense, there are some things to which it does not extend : because if we speak of those things being done, the words are mere words, and have no meaning, being self-contradictory. Thus God himself cannot make twice two not be four ; and in like manner, he cannot make that which is intrinsically bad, not be bad. For as the essence of things, when they exist, and by which they exist, does not depend on anything else, so is it with the properties which follow that essence : and such a property is the baseness of certain actions, when compared with the nature of rational beings. And God himself allows himself to be judged of by

patitur, ut videre est Gen. xviii. 25; Esai. v. 3; Ezech. xviii. 25; Jerem. ii. 9; Mich. vi. 2; Rom. ii. 6, iii. 6.

6 Fit tamen interdum ut in his actibus, de quibus jus naturæ aliquid constituit, imago quædam mutationis fallat incautos, cum revera non jus naturæ mutetur, quod immutabile est, sed res, de qua jus naturæ constituit, quæque mutationem recipit. Exempli gratia: si creditor quod ei debeo acceptum ferat, jam solvere non teneor, non quia jus naturæ desierit præcipere solvendum quod debeo, sed quia quod debbam deberi desiit: ut enim recte in Epicteto Arrianus: οὐκ ἀρκεῖ τὸ δανείσασθαι πρὸς τὸ ὀφείλειν, ἀλλὰ δεῖ προσεῖναι καὶ τὸ ἐπιμένειν ἐπὶ τοῦ δανείου, καὶ μὴ διαλελύσθαι αὐτό· non sufficit ut debeatur pecunia datam esse mutuum, sed oportet ut et maneat adhuc indissoluta mutui obligatio. Ita si quem Deus occidi præcipiat, si res alicujus auferri, non licitum fiet homicidium aut furtum, quæ voces vitium involvunt, sed non erit homicidium aut furtum, quod vitæ et rerum supremo domino auctore fit.

Lib. i. Diss.
c. vii. pag. 34.

7 Sunt et quædam juris naturalis non simpliciter, sed pro certo rerum statu: sic communis rerum usus naturalis fuit, quamdiu dominia introducta non erant; et jus suum per vim consequendi ante positas leges.

* Vide PUFENDORF. *De Jure Nat.* et *Gen.* Lib. ii. cap. 3. § 5.

⁶ Locus est *Ethic. Nic.* Lib. ii. cap.

6. Sed tu inspicie, et non satis apte heio adferri animadvertes. J. B.

this rule. [See the quotations. The passage from Aristotle, *Eth. Nicom.* ii. 6, is misapplied, as Barbeyrac observes.]

6 Yet sometimes, in acts directed by Natural Law, there is a seeming of change, which may mislead the unwary; when in fact it is not Natural Law which is changed, but the thing about which that Law is concerned. Thus if a creditor gives me a receipt for my debt, I am no longer bound to pay him; not that Natural Law has ceased to command me to pay what I owe, but because I have ceased to owe it. So if God command any one to be slain or his goods to be taken, this does not make lawful homicide or theft, which words involve crime: but the act will no longer be homicide or theft, being authorized by the supreme Lord of life and of goods.

7 Further; some things are according to Natural Law, not simply, but in a certain state of things. Thus a community in the use of things was natural till property was established; and the right of getting possession of one's own by force existed before instituted law.

XI. 1 Discrimen autem quod in juris Romani libris exstat, ⁷ut jus immutabile aliud sit quod animantibus cum homine sit commune, quod arctiori significato vocant jus naturæ; aliud hominum proprium, quod sæpe jus gentium nuncupant, usum vix ullum habet. Nam juris proprie capax non est nisi natura præceptis utens generalibus, quod recte vidit Hesiodus:

Oper. et Dies.
276, et seqq.

Τόνδε γὰρ ἀνθρώποισι νόμον διέταξε Κρονίων·
Ἴχθύσι γάρ, καὶ θηροῖς, καὶ οἰωνοῖς πετεινοῖς,
Ἐσθθήμεν ἀλλήλους· ἐπεὶ οὐ δίκη ἐστὶ μετ' αὐτῶν.
⁹ Ἀνθρώποισι δ' ἔδωκε δίκην, ἥ πολλὸν ἀρίστην.

Humano generi nam lex datur ab Jove summo:
Quippe feræ, pisces, avium genus altivolantum
Mutua se vertunt in pabula, juris egentes,
Justitia at nobis, quæ res est optima, cessit.

Cap. 16.

In equis, in leonibus justitiam non dicimus, inquit Cicero de Officiis primo. Plutarchus in vita Catonis majoris, νόμῳ μὲν γὰρ καὶ δικαίῳ πρὸς ἀνθρώπους μόνον χρῆσθαι πεφύκαμεν· *lege et justitia adversus homines tantum natura utimur.* Lactantius, Lib. v. cap. 17: *In omnibus enim videmus*

⁷ Vide PUFENDORFIUM nostrum *De Jure Nat. et Gent.* Lib. II. cap. iii. § 2, 3. *J. B.*

⁹ Ἀνθρώποισι δ' ἔδωκε δίκην] Juvenalis *Sat.* xv. v. 142. et seqq.

— Venerabile soli
Sortiti ingonlum divinatorumque capaces,
Atque exercendis capiendisque artibus apti,
Sensum e coelesti demissum traximus arce,
Cujus egent prona et terram spectantia, Mundi
Principio indulsit communis Conditor illa.
Tantum animas, nobis animum quoque, mutuas
ut nos

Affectus petere auxilium et præstare juberet,
Dispersos trahere in populum, etc.

Chrysostomus ad VII. Rom. (*Homil.* VIII. p. 118): τὸν τοῦ δικαίου καὶ ἀδίκου λόγου οὐδὲ κωθεῖν δεῖ ἐπὶ τῶν ἀψύχων

καὶ ἀναισθητῶν. [Id est, justī et iniusti regulas, neque adversus inanimata et sensu carentia, movendas aut negligendas. Quod igitur innuere potius videtur, jus aliquod esse Brutis cum Homine commune. *J. B.*]

¹ Si quis in parentes injurias fuisset] Exemplum vide in Chamo, Gen. ix. 22. Ubi pœna sequitur.

² Καὶ δυσαρρεστέισθαι τοῖς παροῦσι] Chrysostomus xiii. *de Statuis* [Tom. VI. pag. 550]: καὶ γὰρ τὸ συναγανακτεῖν τοῖς ὑβριζομένοις, φυσικὸν ἅπαντες ἔχομεν. εὐθείας οὖν τοῖς ἐπηρεάζουσιν ἔχροιο γινόμεθα καὶ μηδὲν ἄμεν αὐτοὶ πεπονθότες. *Natura id habemus, ut indignationem nostram*

XI. 1 What the Roman lawbooks say of a law of nature which we have in common with animals, which they call more peculiarly *jus nature*, besides the natural law which we have in common with men, which they often call *jus gentium*, is of little or no use. For no creature is properly capable of *Jus*, which does not by nature use general precepts: as has been remarked by Hesiod, Cicero, Lactantius, Polybius. [See the quotations.]

animalibus, quæ sapientia carent, conciliatricem sui esse naturam. Nocent enim aliis ut sibi prosint : nesciunt enim quia malum est nocere. Homo vero, quia scientiam boni et mali habet, abstinere se a nocendo etiam cum incommodo suo. Polybius, cum narrasset quibus initiis primum convenissent homines, addit, 'si quis in parentes aut beneficos injurius fuisset, fieri non potuisse quin id ceteri ægre ferrent, ratione addita : τοῦ γὰρ γένους τῶν ἀνθρώπων ταύτη δια- Lib. vi. 4. φέροντος τῶν ἄλλων ζώων, ἥ μόνοις αὐτοῖς μέτεστι νοῦ καὶ λογισμοῦ φανερόν ὡς οὐκ ἂν εἰκὸς παρατρέχειν αὐτοὺς τὴν προεξημένην διαφορὰν, καθάπερ ἐπὶ τῶν ἄλλων ζώων, ἀλλ' ἐπισημαίνεσθαι τὰ γινόμενα ^a καὶ δυσαρεστεῖσθαι τοῖς παροῦσι : quoniam enim humanum genus hoc aliis animantibus distat, quod mente ac ratione utitur, omnino credibile non est tam alienum a natura sua actum ab ipsis dissimulatum iri, ut in aliis animantibus : sed quod factum est, revocatum iri ad animum cum offensæ significatione.

2 Quod 'si quando brutis animantibus justitia tribuitur, id fit improprie ^aex quadam in ipsis umbra rationis atque vestigio. An vero actus ipse, de quo jus naturæ constituit, sit nobis communis cum aliis animantibus, ut proles educatio ;

conjugamus cum iis qui male tractati sunt. illico enim injuriis hominibus insensum sumus, etiamsi ad nos nulla pars injuriæ pervenit. Scholiastes ad Horatium, *Satyræ* III. Lib. I. [vers. 97]. *Sensus aliter indignatur et animus, cum audierit homicidium factum, aliter cum furtum.* [In fine loci Polybiani, pro vocibus τὰ γινόμενα, legitur τὸ γινόμενον, in Ed. Casauboni.]

¹ Si quando brutis animantibus justitia tribuitur] Divinationem quandam justitiæ in elephantis notat Plinius Lib. VIII. cap. 6. Idem [libro x.] narrat aspidem fuisse quæ suum ipsa catulum necaret, quod si catulus hospitis filium interemisset.

^a Ex quadam in ipsis umbra rationis atque vestigio] Seneca de Ira libro I. cap. 3. *feras ira carere dixit, sed pro ira habere impetum. Muta animalia, ait, humanis affectibus carent : habent autem similes illis quosdam impulsus.* Sic in bestiis non esse κακίαν sed οὐλοὶ κακίαν, non vitia sed vitiorum simulacra, dixit [Origenes contra Celsum] : *ὡς δὲ θυμοῦσθαι τὸν λέοντα, velut irasci leonem.* [L. IV. p. 225.] Peripatetici apud Porphyrium, *de non essu animantium tertio.* [Pag. 309. Adde quæ habet de Stoicis, Cl. HEINECCIUS, *Elem. Juris Civil. secundum ordinem Institution. Justinian.* Lib. I. Tit. xxvi. § 303. in Not.]

2 If we ever assign justice to brute animals, it is improperly, when we see in them some shadow or vestige of reason. There being acts which we have in common with brutes, as the rearing of offspring, and others which are peculiar to us, as the worship of God, has no bearing on the nature of Jus.

an nobis proprius, ut Dei cultus, ad juris ipsam naturam nihil refert.

XII. 1 Esse autem aliquid juris naturalis probari solet tum ab eo quod prius est, tum ab eo quod posterius, quarum probandi rationum illa subtilior est, hæc popularior. A priori, si ostendatur rei alicujus convenientia aut inconvenientia necessaria cum natura rationali ac sociali: a posteriori vero, si non certissima fide, ³ certe probabiliter admodum, juris naturalis esse colligitur id, quod apud omnes gentes, aut moratiores omnes tale esse creditur. Nam universalis effectus universalem requirit causam; talis autem existimationis causa vix ulla videtur esse posse præter sensum ipsum, communis qui dicitur.

2 Hesiodi est dictum a multis laudatum⁹:

Φήμη δ' οὖτις πάνπαν ἀπόλλυται, ἦντινα πολλοὶ
λαοὶ φημίζουσιν.

Non etenim penitus vana est sententia, multi
Quam populi celebrant.

³ Quousque ratio illa valere queat, vide apud PUFENDORF. *De Jur. Nat. et Gent.* Lib. II. cap. 3. § 7, 8 et in Præfatione nostra Gallica ad hoc opus, § 4. J. B.

⁹ Exstat in *Operib. et Dieb.* vera. penult. sed ibi agitur tantum de rumoribus adversus aliquem sparsis, qui, falsi licet, famam ejus nonnihil lædunt. J. B.

* Τὰ κοινῇ φαινόμενα πιστά] Aristoteles *Nicom.* x. 11: ὁ γὰρ πᾶσι δοκεῖ τοῦτο εἶναι φανέν, ὃ δ' ἀναιρῶν ταύτην τὴν πίστιν οὐ πᾶν πιστότερα ἐρεῖ. Quod omnibus ita videtur, id ita esse dicimus, qui vero hanc fidem velit tollere, nihilo ipse credibilia dicet. Seneca, *Epist.* 81. In tanta judiciorum diversitate referendam bene merentibus gratiam omnes uno tibi, quod aiunt, ore affirmabunt. Quintilianus: Consuetudinem

sermonis vocabo consensum eruditorum, sicut vivendi, consensum bonorum. (*Instit. Orat.* Lib. I. cap. 6.) Josephus *Antiquæ Historiæ* xvi. (Cap. vi. sect. 8): ἔθεσιν μὲν γὰρ οὐδέν ἐστι γένος δ τοῖς αὐτοῖς διὰ χρῆται, κατὰ πόλει ἐσθ' ὅπη πολλῆς γνωμένης τῆς διαφορᾶς. τὸ δίκαιον δὲ πᾶσιν ἀνθρώποις ὁμοίως ἐπιτηδεύει, λυσιτελέστατον δὲ Ἑλλήσι τε καὶ βαρβάροις, οὐ πλείστον οἱ παρ' ἡμῖν νόμοι λόγον ἔχοντες, ἀπᾶσιν ἡμᾶς, εἰ καθαρῶς ἐμμένοιμεν αὐτοῖς, ἐθνους καὶ φύλου ἀπεργάζονται. διὸ καὶ ταῦτα παρ' ἐκείνων ἡμῖν ἀπαιτητῆς, καὶ δέον οὐκ ἐν διαφορᾷ τῶν ἐπιτηδευσμάτων οἰεσθαι τὸ ἀλλότριον, ἀλλ' ἐν τῷ πρὸς καλοκάγαθίαν ἐπιτηδεύειν ἔχειν. τοῦτο γὰρ κοινὸν ἅπασιν, καὶ μόνον ἱκανὸν διασφῆναι τὸν τῶν ἀνθρώπων βίον. *Moribus gens nulla est quæ iisdem tota utatur,*

XII. 1 That there is such a thing as Natural Law, is commonly proved both *a priori* and *a posteriori*; the former the more subtle, the latter, the more popular proof. It is proved *a priori* by shewing the agreement or disagreement of anything with the rational and social nature of man. It is proved *a posteriori* when by certain or very probable accounts we find anything accepted as Natural Law among all nations, or at least the more civilized. For a universal effect

²Τὰ κοινῇ φαινόμενα πιστὰ, ἵνα *communiter ita videntur fida sunt*, aiebat Heraclitus statuens λόγον τὸν ^[Ethic. Eud. 6.] ξυνὸν optimum esse veritatis κριτήριον. Aristoteles: κράτιστον πάντας ἀνθρώπους φαίνεσθαι συνομολογούντας τοῖς ῥηθησομένοις: *potentissima probatio est, si in id quod dicimus omnes consentiant*. Et Cicero: *in re consensio omnium gentium jus naturæ putanda est*. Seneca: *Argumentum veritatis est aliquid omnibus videri*. Quintilianus: *Pro certis habemus ea in quæ communi opinione consensus est*. Non frustra autem dixi gentes moratiores: nam, ut recte notat Porphyrius, ἵτινὰ τῶν ἐθνῶν ἐξηγρίωται, καὶ ἐστὶ φύσει ^{De non eru Animant. iv. p. 428.} θηριώδη, ἐξ ὧν οὐ προσήκει τοὺς εὐγνώμονας τῆς ἀνθρωπίνης καταψεύδεσθαι φύσεως: *quædam nationes efferatæ sunt, et factæ inhumanæ, ex quibus non oportet ab æquis iudiciis æstimatione facta humanæ naturæ convicium fieri*. Andronicus Rhodius: παρ' ἀνθρώποις τοῖς τε ὀρθῶς καὶ ὑγιῶς ^{Paraph. in Arist. Ethic. Nic. v. 10.} ἔχουσιν, ἐστὶ δίκαιον ἀκίνητον, ὃ φυσικὸν λέγεται. εἰ δὲ τοῖς νοσοῦσι τὰς φρένας καὶ διεστραμμένοις οὐ δοκεῖ δίκαιον,

sæpe oppidatim discrepatur plurimum. At jus ipsum omnibus æqualiter hominibus expedit, iam barbaris utile quam Græcis, cujus quidem rationem habentes maximam, quæ apud nos sunt leges, faciunt nos, eas pure modo observemus, cunctis hominibus benevolos et amicos. Talia sunt quæ exigi a legibus par est. Neque illas aversari ut a se alienas arbitrari debent alii, in eo quod institutis differunt, sed id potius spectandum an ad virtutem ac probitatem sint accommodatæ. Hoc enim ad omnes communiter pertinet, solumque per se sufficit ad tutandam hominum vitam. Tertullianus, Præscriptione Adversus Hæreticos (cap. 28): Quod apud multos unum invenitur, non est erratum sed traditum. [Omnia ista loca, si duo priora excipias, parum ad rem faciunt. Immo verba Quintiliani contrarium in-

nuere potius videntur. J. B.]

¹ Refert id SEXTUS EMPIRICUS, Lib. VII. *Adversus Mathematic.* Ὅθεν τὸ μὲν κοινῇ πᾶσι φαινόμενον, τοῦτ' εἶναι πιστόν. § 134, p. 399. Vide sequentia. Porro locus Aristotelis postea laudatus, Κράτιστον &c. exstat Eudemior. Lib. I. cap. vi. p. 199 c, Tom. II. J. B.

² Τινὰ τῶν ἐθνῶν ἐξηγρίωται] Justinus colloquio cum Tryphone [p. 320 D, § 93]: πλὴν ὅσοι ὑπὸ ἀκαθάρτου πνεύματος ἐμπεφορμημένοι, [καὶ ὑπὸ φαύλης] ἀνατροφῆς, καὶ ἐθῶν φαύλων, καὶ νόμων πονηρῶν διαφθαρέντες, τὰς φυσικὰς ἐννοίας ἀπώλεσαν. Exceptis illis qui ab impuris spiritibus abrepti, et per malam educationem, instituta prava et leges iniquas corrupti, naturales notiones perdiderunt. Philo libro, Omnem bonum esse liberum: διὸ καὶ θαυμάσαι

requires a universal cause: now such a universal belief can hardly have any cause except the common sense of mankind.

Hesiod, Heraclitus, Aristotle, Cicero, Seneca, Quintilian, agree that the consent of all nations is evidence of the truth. And Porphyry, Andronicus of Rhodes, Plutarch, Aristotle, agree that the more savage nations are of less weight in such an estimate. [See the quotations.]

p. 633. D.

Top. v. 2.

Pol. i. 5.

οὐδὲν διαφέρει, οὐδὲ γὰρ ὁ λέγων τὸ μέλι γλυκὺ εἶναι ψεύδεται, διότι τοῖς νοσοῦσιν οὐ τοιοῦτον δοκεῖ. *Apud homines recta sanaque mente præditos immutabile est jus illud naturæ quod dicitur. Quod si his, qui morbo distortoque sunt animo, aliter videtur, nihil id ad rem pertinet. Nam nec mentitur qui mel dulce esse dicit, ideo quod ægrotis aliter videatur.* A quibus non abit Plutarchi illud in vita Pompeii: φύσει μὲν ἄνθρωπος οὔτε γέγονεν, οὔτ' ἔστιν ἀνήμερον ζῶν οὐδ' ἄμικτον, ἀλλ' ἐξίσταται τῇ κακίᾳ παρὰ φύσιν χρώμενος, ἔθεσι δὲ καὶ τόπων καὶ βίου μεταβολαῖς ἐξημεροῦνται. *natura quidem nullus hominum aut est aut fuit ferum atque insociabile animal sed efferatur ubi extra naturæ modum peccare assuescit, rursusque alia consuetudine vitæque et locorum mutatione redit ad mansuetudinem.* Aristoteles descriptionem hominis, ex eo quod ipsi proprium est, hanc facit; ἄνθρωπος, *ζῶν ἡμερον φύσει *homo animal est suapte natura mansuetum.* Idem alibi: δεῖ δὲ σκοπεῖν ἐν τοῖς κατὰ φύσιν ἔχουσι μᾶλλον τὸ φύσει, καὶ μὴ ἐν τοῖς διεφθαρμένοις. *quid naturale sit spectandum in his quæ bene secundum naturam se habent, non in depravatis.*

ἂν τις τῆς ἀμβλυωπίας τοὺς τρανὰς οὕτω πραγμάτων ιδιότητας μὴ συνωρῶντας· merito igitur miretur quis, tantam illis offusam caliginem, ut tam claras rerum proprietates non videant, [p. 871. B.] Chrysostomus oratione, Christum Deum esse: μὴ τοίνυν ἀπὸ τῶν διεφθαρμένων τὰς γνώμας, τὰς κρίσεις ποιοῦ τῶν πραγμάτων. *Ne ergo rerum adjudicationem ab illis mutuare quibus corruptus est animus.* [Tom. VI.

p. 634. init.]

* Ζῶν ἡμερον φύσει] Idem dicit Chrysostomus XI. de Statuis. [Tom. VI. p. 537.] Latius id explicat Philo decalogo: ἀγελαστικὸν γὰρ καὶ σύννομον ζῶν τὸ ἡμερώτατον ἢ φύσει γεννήσασα, πρὸς δμόνοιαν καὶ κοινωνίαν ἐκάλεσε, λόγον δοῦσα συναγωγῇ εἰς ἁρμονίαν καὶ κράσιν ἡθῶν. [pag. 763. A.] *Quod animalium esse debeat mansuetissimum, idem*

XIII. Thus much of Natural Law; next of Positive or Instituted Law. [See Sect. x. 2.] And this is either Human or Divine.

XIV. Of Human [instituted] Law, first, as more widely known.

This is either the Civil Law, [that is, the National Law,] or Law in a narrower, or in a wider sphere.

The Civil Law is that which governs the State, (*Civitas*).

The State, (*Civitas*) is a perfect [that is, independent] collection of free men, associated for the sake of enjoying the advantages of *jus*, and for common utility.

Law in a narrow sphere, and not derived from the State, though subject to it, is various, as paternal precepts, the commands of a master, and the like.

XIII. Alteram juris speciem esse diximus jus voluntarium ²quod ex voluntate originem ducit: estque vel humanum vel divinum.

XIV. 1 Ab humano incipiemus, quia id pluribus innuit. Est ergo hoc vel civile, vel latius patens, vel arctius. Civile est quod a potestate civili proficiscitur. Potestas civilis est, quæ civitati præest. Est autem civitas coetus perfectus liberorum hominum, juris fruendi et communis utilitatis causa sociatus. Jus arctius patens et ab ipsa potestate civili non veniens, quanquam ei subditum, varium est, præcepta patria, dominica, et si qua sunt similia in se continens. Latius autem patens est jus gentium; id est quod gentium omnium ³aut multarum ⁴voluntate vim obligandi accepit. Multarum addidi, quia vix ullum jus reperitur extra jus naturale, quod ipsum quoque gentium dici solet, omnibus gentibus commune. Imo sæpe in una parte orbis terrarum est jus gentium quod alibi non est, ut de captivitate ac postliminio suo loco dicemus.

2 Probatur autem hoc jus gentium pari modo quo jus non scriptum civile, usu continuo et testimonio peritorum. Est enim hoc jus, ut recte notat Dio Chrysostomus, εὐρημα

Orat. xxxvi.
p. 642. B.

natura fecit gregale et coetus appetens, et ad concordiam societatemque vocavit; sermonem etiam præbens qui ingenia attemperando et ad concentum perducendo conciliaret. Idem de Mundi immortalitate: ἡμετέρων γὰρ ζῶον ὁ ἄνθρωπος, λόγον δωρησαμένη φύσις αὐτῷ γίγας, ᾧ καὶ τὰ ἐξηγηριωμένα πάθη κατεπείδεται καὶ τῷ ἀσσεύεται. Mangetissimum animantium homo est, ut cui natura pro munere sermonem dederit, quo affectus quantumvis efferati velut

incantando cicurantur. (p. 945. E.)

³ Confer PUFENDORF. *De Jure. Nat. et Gent.* Lib. 1. cap. vi. § 18. J. B.

⁴ Aut multarum] Vasquius II. *Controvers.* LIV. 4.

⁵ Tale jus non datur. Quæ enim ad illud referuntur, vel ad *Jus Nature* immutabile pertinent, vel meri sunt mores, inter plures aut pauciores Gentes recepti, qui per se nullam vim obligandi habent, sed tunc demum illam accipiunt, quando quis heic et nunc se illis subji-

Law in a wider sphere is *Jus Gentium*, the Law of Nations, that Law which has received an obligatory force from the will of all nations, or of many.

I have added "*or of many*," because scarce any Law is found, except Natural Law, (which also is often called *Jus Gentium*,) common to all nations. Indeed that is often *Jus Gentium* in one part of the world which is not so in another; as we shall shew when we come to speak of captivity and of *postliminium*.

2 This *Jus Gentium*, Law of Nations, is proved in the same manner as the unwritten Civil Law, by constant usage, and the testimony of those who have made it their study. It is, as Dio Chrysostom says,

βίου καὶ χρόνου, *repertum temporis et usus*. Atque in eam rem maximum nobis usum præbent illustres annalium conditores.

XV. 1 Jus voluntarium divinum quod sit, satis ex ipso vocum sono intelligimus: 'id nimirum quod ex voluntate divina ortum habet: quo discrimine a jure naturali, quod item divinum dici posse diximus, internoscitur. In hoc jure locum habere potest, quod nimium indistincte^b dicebat Anaxarchus apud Plutarchum in Alexandro: non ideo id Deum velle, quia justum est, sed justum esse, id est jure debitum, quia Deus voluit.

2 Hoc autem jus aut datum est humano generi, aut populo uni. Humano generi ter jus datum a Deo reperimus: statim⁵ post hominem conditum, iterum in reparatione humani generis post diluvium, postremo in sublimiori reparatione per Christum. Tria hæc jura haud dubie omnes homines obligant, ex quo quantum satis est ad eorum notitiam pervenerunt.

XVI. 1 Ex omnibus populis unus est, cui peculiariter Deus jura dare dignatus est, populus scilicet Hebræus, quem

cit, pacto expresso vel tacito. Qua de re diximus in Notis Gallicis ad hunc nostrum Auctorem. Vide et PUFENDORF. *De Jur. Nat. et Gent.* II. 3. 23. *J. B.*

⁴ Vide Auctoris Epist. Part. II. Epist. 429. ubi refellit, quæ SALMASTIUS

adversus eum dixerat. *J. B.*

^b Dicebat Anaxarchus] Est apud Plutarchum in Alexandro. [pag. 595. A. Tom. I. Vide quæ de illo loco scripsimus, in PUFENDORF. *De Jur. Nat. et Gent.* Lib. II. cap. 3, § 4, n. 1. *J. B.*]

⁵ De his omnibus fuse egimus in Notis

the invention of life and of time. And here the best historians are a great help to us*.

XV. 1 What is Divine [instituted] Law is sufficiently apparent from the term itself; namely, that which has its origin from the Divine Will; by which character it is distinguished from Natural Law, which also may be called Divine, [but which is independent: see § x, 5]. In such Law it may be said, but with reserve, that God did not command the act because it was just, but that it was just because God commanded it.

2 This Law is given either to the whole human race, or to one nation. To the human race, the Law has thrice been given by God; at the Creation; immediately after the Deluge, and at the coming of

* Concerning the distinction of the two senses of *Jus Gentium*, that of the Romans, with whom it means the Law common to all nations, and that of the moderns with whom it means the Law between nations, see *Elements of Morality*, 1051.

sic alloquitur Moses Deut. iv. 7. *Quæ gens tam magna, cui Dei propinqui, sicut dominus Deus noster, ad omnia vota quæ ei facimus? quæ gens tam magna, cui sint constitutiones et jura æqua, qualis est lex hæc tota, quam ego hodie coram vobis propono?* Psalmographus Psalmo cxlvii: *Indicat Deus verba sua Jacobo, constitutiones ac jura sua Israeli, non ita fecit genti ulli: ideo jura ista non novērunt.* Vs. 19, 20.

2 Nec dubitandum, quin fallantur Judæorum illi (quos inter Tryphon in disputatione cum Justino) qui existimant etiam alienigenis, si salvi esse vellent, subeundum fuisse legis Hebraicæ jugum. *Neque enim eos obligat lex, quibus data non est. At quibus data sit lex, ipsa loquitur: *Audi Israel.* Et passim fœdus cum ipsis ictum, ipsi in peculiarem Dei populum adsciti dicuntur: quod verum esse agnoscit et ex loco Deuteron. xxxiii. 4. probat Maimonides.

3 Quin inter ipsos Hebræos vixerunt semper aliqui exteri homines *εὐσεβεῖς καὶ σεβόμενοι τὸν Θεόν*, qualis Syrophœnissa Matth. xv. 22; qualis ille Cornelius Actor. x. 2, *τῶν σεβομένων Ἑλλήνων.* Actor. xvii. 4, Hebraice *יְדֻּיּוֹת*

nostris Gallicis ad hunc locum. J. B.

* *Questio de salute Ethnicorum* heic omnino seponenda, utpote ad rem nihil faciens. Sive enim Ethnici, absque cognitione et observatione Legis Hebraicæ vitam æternam consequi poterint, sive non potuerint: hoc certum,

eos, qui illa excludentur, non ideo damnatum iri, quod Legem eam ignoraverint, adeoque non observaverint, cujus nullam notitiam habebant, nec habere poterant; sed quod adversus Legem Naturalem, quam ex lumine Rationis haurire eis licebat, peccaverint. J. B.

Christ. These three sets of Laws oblige all men, as soon as they acquire a sufficient knowledge of them.

XVI. 1 There is one nation in particular to which God has especially given his Laws, namely, the Hebrew people. See Deut. iv. 7; Psalm cxlvii.

2 It is erroneous to suppose (as some Jews have done) that those of other nations, in order to be saved, must submit to the Jewish law. For the law does not oblige those to whom it is not given; and it tells us itself to whom it is given, by saying, "Hear, O Israel." And the Jews are perpetually spoken of as under a special covenant, and chosen to be a peculiar people of God; as Maimonides proves from Deut. xxxiii. 4.

3 There were however always living among the Jews certain "devout persons," as the Syrophœnician woman, Cornelius, the "devout Greeks" (Acts xvii. 4), who are also spoken of in various passages of

אומות pii ex Gentibus: ut legitur ^c titulo Thalmudico de Rege. Talis qui est, in lege dicitur בן נכר Levit. xxii. 25, ותרשב Levit. xxv. 47, ubi Chaldæus dixit ^d incolam incircumcisum. Hi, ut narrant ipsi Hebræorum magistri, leges Adamo et Noë datas servare tenebantur, abstinere ab idolis et sanguine, et aliis quæ infra suo loco memorabuntur, at non item leges proprias Israelitarum. Itaque cum Israelitis non liceret vesci carne bestię quæ fato suo periisset, peregrinis tamen inter ipsos viventibus id licebat, Deuter. xiv. 21. Nisi quod quibusdam legibus specialiter expressum est, ut incolæ iis non minus quam indigenæ teneantur¹.

4 Extraneis etiam, qui aliunde advenirent, neque institutis Hebraicis subjicerentur, in templo Hierosolymitano licuit Deum adorare, et victimas offerre, ^estantibus tamen in loco peculiari ac separato a statione Israelitarum, 1 Reg. qui Latinis 3 Reg. viii. 41, 2 Macc. iii. 35, Johan. xii. 20, Ac-

^c *Titulo Thalmudico de Rege*] Et titulo de Synedrio, cap. 11.

^d *Incolam incircumcisum*] De tall agitur et *Exodi* xii. 45. A quo distinguitur proselytus, id est circumciscus advena, ut ostendit collatio loci *Num.* ix. 14. De piis illis incircumciscis multa habet Maimonides libro *de Idololatria*, c. x. § 6. Idem in commentario ad *Misnaïoth*, et alibi sæpe, pios illos ex gentibus participes ait futuros bonorum futuri sæculi. Chrysostomus ad Romanos cap. 2: ποῖον Ἰουδαῖον ἐνταῦθά φησιν, ἢ περὶ ποίαν Ἑλλήνων διαλέγεται; τῶν πρὸ τῆς τοῦ Χριστοῦ παρουσίας. οὕτω γὰρ εἰς τοὺς τῆς χάρι- στος ἐφθασε χρόνους ὁ λόγος· quem *Judeum hic indicat, et de quibus Græci*

disserit? de iis qui ante Christi adventum fuere: nondum enim ad Græcæ tempora perducta est oratio. Deinde: Ἑλλήνας δὲ ἐνταῦθά φησιν, οὐ τοὺς εἰδωλολατρῶντας, ἀλλὰ τοὺς θεοσεβούντας, τοὺς τῷ φυσικῷ κειθόμενους λόγῳ, τοὺς πλὴν τῶν Ἰουδαϊκῶν παρατηρήσεων πάντα τὰ πρὸς εὐσέβειαν συντελοῦντα διατηροῦντας. Exemplum plaque dat in Melchisedeco, Jobo, Ninivitis, Cornelio, mox: Ἑλλήνα δὲ πάλιν οὐ τὸν εἰδωλολάτρην, ἀλλὰ τὸν θεοσεβῆ καὶ ἐνδρετον καὶ τῶν νομικῶν παρατηρήσεων ἀπηλλαγμένον φησί· Græcos hic dicit, non idolorum cultores, sed in Deum pios, naturali rationi obsequentes, qui præter Judaica instituta, cuncta quæ ad pietatem facerent servabant. Et Græ-

the Old Testament [see the references.] These, as the Jewish doctors teach, were bound to obey the laws given to Adam and to Noah, to abstain from idols and from blood, and some other matters; but not to observe the peculiar Jewish laws: except that some laws expressly direct that not only the Jew, but the stranger within his gate should be bound by them: [as the law of the Sabbath: *Exod.* xx. 10].

4 It was also permitted to strangers to worship and to sacrifice in the temple; but standing in a peculiar place, separate from the place of the Israelites.

The prophets speaking to strangers; Elisha to Naaman, Jonah to

tor. viii. 27. ^fNeque Elisæus Naamani Syro, neque Jonas Ninivitis, neque Daniel Nabuchodonosoro, neque Prophetæ alii Tyriis, Moabitibus, Ægyptiis, ad quos scribunt, unquam significarunt opus ipsis esse ut Mosis legem susciperent^g.

5 Quod de tota lege Mosis dixi, idem et de circumcisione, quæ legis quasi introitus erat, dictum volo. Hoc tantum interest quod lege Mosis Israelitæ soli tenebantur, circumcisionis autem lege tota Abrahami posteritas: unde Idumæos a Judæis coactos circumcisionem suscipere in historiis Hebræorum et Græcorum legimus. Quare qui populi extra Israelitas circumcisi sunt (sunt autem complures, quorum Herodotus, Strabo, Philo, Justinus, Origenes, Clemens Alexandrinus, Epiphanius, ^hHieronymus, meminerunt) eos credibile est ab Ismaele, aut ab Esau, aut ⁱex Cethuræ posteris venisse.

6 Ceterum in aliis omnibus locum habebat Pauli illud,

cum rursus vocat, non cultorem idolorum, sed pium, virtute præditum, a legis vero ritibus liberum. Eundem in sensum trahit illud, τοῖς ἀνθρώποις ὡς ἄνθρωπος, lege solutus ut lege solutus. et oratione xii. de Statuis: "Ἑλλήνα ἐνταῦθα καλεῖ οὐ τὸν εἰδωλολάτρην, ἀλλὰ τὸν προσκυνῶντα μὲν τὸν θεὸν μόνον, οὐκ ἐνδεδεμένον δὲ τῇ τῶν Ἰουδαϊκῶν παρατηρήσεων ἀνάγκῃ, σαββατισμοῖς λέγω καὶ περιτομῇ καὶ καθαρismoῖς διαφόροις, ἀλλὰ φιλοσοφίαν ἅπασαν καὶ εὐσέβειαν ἰνδαικνύμενον. Græcum hic appellat, non idolis deditum, sed unius Dei invocatorem, talem tamen qui Judaicorum rituum necessitati alligatus non sit, sabbatorum puta observationibus, circumcisioni, variis ablutionibus, inte-

rim qui in omnibus sapientia studium pietatemque ostendat. [Tom. vi. pag. 54.]

⁷ Ut in prohibitione operis faciendi die Sabbathi, *Exod. xx. 10. J. B.*

^e *Stantibus in loco peculiari*] Vide Josephum ubi Templi Salomonis historia tractatur. [Confer doctissimum SELDENUM, *de Jur. Nat. et Gent. secundum Hebr. Lib. iii. cap. 6. J. B.*]

^f *Neque Elisæus Naamani Syro*] Idem sentit Hilarius ad Matth. xi.

^g Adde, quæ Auctor habet in alio Opere, *de Verit. Relig. Christ. Lib. v. § 7. J. B.*

^h *Hieronymus*] Addi potest Theodoretus.

ⁱ *Ex Cethuræ posteris*] Ex his orti

the Ninevites, Daniel to Nebuchadnezzar, and other prophets to the Tyrians, Moabites, and Egyptians; never say that they were required to submit to the Law of Moses.

5 The same is true of circumcision; with this difference, that the Law of Moses bound the Israelites only, the law of circumcision, all the posterity of Abraham; whence the Jews imposed circumcision on the Idumeans. Therefore the other peoples who used circumcision were probably descended from Ishmael or from Esau, or from Keturah [Abraham's wife, Gen. xxv. 1].

6 In all other cases, the reasoning of St Paul, Rom. ii. 14, ap-

Rom. ii. 14. *Cum gentes quæ legem non habent natura suapte* (id est moribus ex primævo fonte manantibus: nisi quis malit illud *natura* referre ad præcedentia, ut opponantur gentes Judæis quibus statim natis lex instillabatur) *faciunt ea quæ legis sunt: isti legem non habentes sibi sunt lex: ut qui ostendant ipsum opus legis mentibus suis inscriptum, simul testimonium reddente ipsorum conscientia, et cogitationibus sese mutuo accusantibus aut etiam excusantibus.* Et illud ibidem. *Si præputium* (id est præputiatus homo) *observet mandatum legis, nonne præputium illius pro circumcissione reputabitur?* Bene ergo in Josephi historia Ananias Judæis Izaten Adiabenum (Ezaten hunc Tacitus vocat) docebat ^ketiam citra circumcisionem Deum recte coli et propitium haberi posse. Nam quod extranei multi circumcisi sunt, et per circumcisionem legi se obligarunt (ut explicat Paulus Gal. v. 3) id fecerunt partim ut jus civitatis adipiscerentur (nam proselyti qui Hebræis $\pi\alpha\tau\epsilon\rho\epsilon\varsigma$ hospites justitiæ, ^lpari jure erant cum Israelitis, Num. xv.) ^mpartim ut earum

Antiq. xx. 2.
§ 5.
Ann. xii. 14.

videntur Æthiopum illi, quos circumcisis annumerat Herodotus: Homeritas illos vocat Epiphanius. [Homeritas pars erant Idumæorum; et Auctor ipse id dixit, in libr. *De Verit. Relig. Christ.* L. i. § 16, pag. 63, not. 75, nuperæ ed. Amst. 1718. Ceterum heic, ex sententia ipsius ævo recepta, ponit pro certo, circumcisionem ab Hebræis ad alias gentes manasse. Quem tamen probabile est aliud censurum fuisse, si MARSHAM et SPENCERI, Eruditissimorum Anglorum, opera videre potuisset. J. B.]

^l *Natura suapte* Τοῖς τῆς φύσεως λογισμοῖς, collectionibus naturalibus, ait

Chrysostomus. Idem mox: διὰ τοῦτο γὰρ, φησὶν, εἰσι θαυμαστοί, ὅτι νόμου οὐκ ἐδεήθησαν. *Ob hoc, inquit, admirandi sunt quod lege opus non habuerint.* Item: ἀρκεῖ ἀντὶ τοῦ νόμου τὸ συνειδέναι καὶ λογισμός. *Sufficit pro lege conscientia et rationis usus.* Tertullianus *adversus Judæos*, (cap. 2): *Ante legem Moysis scriptam in tabulis lapideis, legem fuisse contendo non scriptam, quæ naturaliter intelligebatur, et a patribus custodiebatur.* Non longe hinc abit Isocra-teum illud: [pag. 148. A. in *Orat. Areopag.*] δεῖ τοὺς εὖ πολιτευομένους οὐ τὰς στοὰς ἐμπικλάναι γραμμάτων, ἀλλ' ἐν ταῖς ψυχαῖς ἔχειν τὸ δίκαιον.

plies. The Gentiles are a law to themselves: the uncircumcision, keeping this law, is counted for circumcision [v. 26]. And this was acknowledged [see the example]. But circumcision was sometimes undergone by strangers for special objects [see the text]. Yet some in later times perversely held that there was no salvation out of the pale of Judaism.

7 Hence we learn that we are not bound by any part of the Jewish law, peculiarly so called; because all obligation extraneous to Natural Law comes from the will of the Lawgiver; and there is no

promissionum essent participes, quæ non communes humano generi, sed Hebræo populo erant peculiare: quanquam non negem posterioribus sæculis accessisse etiam in nonnullis pravam opinionem, quasi extra Judaismum salus non esset.

7 Hinc colligimus, nulla parte legis Hebrææ, qua lex est proprie, nos obligari, quia obligatio extra jus naturæ venit ex voluntate legem ferentis. Deum autem voluisse ut alii quam Israelitæ ista lege tenerentur, nullo indicio potest deprehendi. Non igitur, nos quod attinet, probanda est ulla legis abrogatio: nam nec abrogari potuit eorum respectu, quos nunquam obstrinxit. Sed ab Israelitis ablata est obligatio, quoad ritualia quidem, statim postquam lex Evangelii cœpit promulgari; quod Apostolorum principi clare fuit revelatum, Act. x. 15; quoad cetera vero, postquam populus ille, per excidium urbis et desolationem, præcisa⁹ omni spe restitutionis, populus esse desiit.

8 Nos vero alienigenæ non id Christi adventu consecuti sumus, ut Mosis lege non teneremur, sed ut qui antea spem

Qui bona republica frui velint, ii debent non literis implere porticus, sed in animis quod justum est ferre.

^k *Etiā citra circumcisionem Deum recte coli et propitium haberi posse*] Ipse Tryphon, de rigore remittens, Justino sic ait: μένοντί σοι ἐν ἐκείνῃ τῇ τῆς φιλοσοφίας τρόπῃ ἐλπίς ὑπελείπετο ἀμείνωνος μοίρας· si in illa philosophandi ratione mansisses, erat tibi reliqua spes aliqua status melioris. [pag. 29. Ceterum de Anania isto vide quæ habet V. C. PETRUS WESSELYNG. *Observat.* Lib. I. cap. 9].

^l *Pari jure erant cum Israelitis*] Justinus colloquio cum Tryphone: προσήλυτος περιτεμνόμενος, εἰ τῇ λαῷ προσ-

καίρηκεν, ἐστὶν ὡς αὐτόχθων. *Proselytus qui circumciscus populo se aggregavit, par est indigenæ.* [p. 351. d. Vide tamen quæ ad hunc l. annotavit Otto. H.]

^m *Partim ut earum promissionum essent participes*] Et ob id ad Paschalis ritus communionem admittebantur. [Vid. *Exod.* xii. 19, 47, 48].

⁹ Ita edidimus, quum antea in omnibus editionibus fuerit, *desolationem præcisam sine spe restitutionis*. Nihil est illud præcisam, junctum τῇ desolationem. Unde autem error typothetarum ab Auctore ipso rebus potius quam verbis intento non animadversus manaverit, quis facile conjicere potest. J.B.

indication that it was the will of God that others besides the Israelites should be bound by that law. We have therefore no occasion to prove the abrogation of this law; for it could not be abrogated with regard to those who were never bound by it. With regard to the Jews, the obligation of the Ritual Law was removed on the promulgation of the Gospel, as was revealed to St Peter, Acts x. 15. The rest of the Jewish Law was abolished by the dispersion of the Jewish nation.

8 What we Gentiles have gained by the coming of Christ is, not that we are freed from the law of Moses: but that, wherever formerly

tantum satis obscuram in Dei bonitate positam habere poteramus, nunc deserto fœdere fulciamur, utque in unam Ecclesiam coalescere possimus cum Hebræis filiis Patriarcharum, sublata ipsorum lege, quo velut intersepimento a nobis distinebantur. Ephes. ii. 14.

XVII. 1 Cum ergo directam obligationem lex per Mosem data in nos inducere non possit, ut jam ostendimus, videamus equeum alium usum habere possit, tum in hac de jure belli, tum in similibus aliis quæstionibus. Id enim scire ad multa refert.

- I. 2 Primum ergo ostendit lex Hebræa, id quod ea lege præcipitur non esse contra jus naturæ. Nam cum jus naturæ, ut ante diximus, sit perpetuum atque immutabile, non potuit a Deo, qui injustus nunquam est, quicquam adversus id jus præcipi. Adde quod lex Mosis vocatur immaculata et recta, Psalm. xix. qui Latinis xviii. 8. et Apostolo Paulo sancta, justa, bona Rom. vii. 12.

De præceptis loquor: nam de permissis distinctius agendum est. Permissio enim quæ lege fit (nam quæ nudi est facti, et impediementi remotionem significat, huc non pertinet) aut plena est, quæ jus dat ad aliquid omnino licite agendum;

^a De posteriori genere aliter se res habet] Vide Chrysostomum ad finem vii. ad Romanos. [Tom. vi. pag. 103].

^b Id nunc etiam, si non et amplius a Christianis præstandum] Tertullianus de Pudicitia: Libertas in Christo non

we could only have an obscure hope founded on the goodness of God, we now have a Covenant, and may be gathered into one Church with the descendants of the Patriarchs, the Law being taken away, which was the partition-wall between us; Eph. ii. 14.

XVII. 1 Since then the law of Moses cannot impose any direct obligation upon us, let us see if it can be of any other use in questions of the Rights of War, and the like.

2 (1) In the first place, the Jewish Law shews that what is commanded by that law is not contrary to Natural Law. For Natural Law being, as we have said [x. 5] perpetual and immutable, God, who is never unjust, could not command anything against that Law. Add that the Law is called right, pure, holy, just, and good. [See the quotations].

This is true of precepts: with regard to permissions, we must distinguish. Permission, as a mere fact, [that is, by saying nothing, as the law does concerning actions altogether indifferent,] need not be considered. Permission legal, is either plenary, which gives a right to do a thing entirely lawfully; or less full, which only gives impunity among

aut minor plena, quæ tantum impunitatem dat apud homines et jus ne quis alius impedire licite possit. Ex prioris generis permissione non minus quam ex præcepto sequitur id de quo lex agit contra jus naturæ non esse. ^aDe posteriori genere aliter se res habet. Sed raro locum habet hæc collectio: quia cum permittentia verba sint ambigua, magis ex jure naturæ interpretari nos convenit utrius generis sit permissio, quam ex permissionis modo ad jus naturæ argumentando procedere.

3 Huic primæ observationi affinis est altera, licere nunc his qui imperium inter Christianos obtinent, leges ferre ejus sensus cujus sunt leges per Mosem datæ, nisi si quæ sint leges, quarum tota substantia ad tempus Christi expectati et Evangelii nondum revelati pertineat, aut nisi Christus ipse contrarium, aut in genere aut in specie, constituerit. Nam his tribus causis demptis nulla potest alia excogitari, cur quod olim Mosis lege fuit constitutum, nunc sit extra ea quæ licent.

II.

4 Tertia observatio hæc sit: quicquid ad eas virtutes pertinens quas Christus a suis discipulis exigit, lege Mosis præceptum est, ^oid nunc etiam, si non et amplius, a

III.

fecit innocentie injuriam; manet lex tota pietatis, sanctitatis, humanitatis, veritatis, constantie, castitatis, justitiae, misericordiae, benevolentiae, pudicitiae. (Cap. 6).

men, and a Right not to be impeded by any other person. Permission of the former kind, no less than precept, proves that the matter so stated is not against Natural Law. With regard to permission of the latter kind, the case is different. But this inference [from the Law of Moses to the Natural Law] rarely occurs: because when the words of permission are ambiguous, it is more convenient to infer, from the Natural Law, the kind of the permission, than from the kind of the permission to infer the agreement with Natural Law.

3 (2) We remark also: that it is now lawful for the Rulers of Christian states to make laws of the same purport as the laws of Moses; except those Mosaic Laws of which the whole substance belonged to the time when Christ was expected, and the Gospel not yet revealed; or except Christ has commanded the contrary generally; or specially. With these three exceptions, there cannot be devised any case in which that which was formerly instituted by the Law of Moses should not be within the lawful sphere of instituted law at present.

4 (3) In the third place: whatever is commanded by the law of Moses, connected with the virtues which Christ requires from his dis-

Christianis præstandum. Fundamentum hujus observationis est, quod quæ virtutes a Christianis exiguntur, ut humilitas, patientia, dilectio, exiguntur ^pin majore gradu quam statu legis Hebraicæ exigebantur: idque merito; quia etiam promissiones cœlestes in Evangelio multo clarius proponuntur. Hinc lex vetus comparatione Evangelii dicitur fuisse nec perfecta, nec ἀμεμπτος, Heb. vii. 19; viii. 7. et legis finis dicitur Christus, Rom. x. 5. lex autem manuductrix ad Christum, Gal. iii. 25. Sic lex vetus de sabbato, ^qet altera de decimis, monstrant Christianos obligari, ne minus septima temporis parte ad cultum divinum, nec minus fructuum decima, in alimenta eorum, qui in sacris rebus occupantur, aut similes pios usus seponant.

^p *In majore gradu*] Chrysostomus *de Virginitate* LXXXIV. [Tom. vi. pag. 295]. μεῖζονα ἐπιδείκνυσθαι δεῖ τὴν ἀρετὴν, ὅτι πολλὰ ἡ τοῦ πνεύματος χάρις ἐκκέχυται νῦν, καὶ μεγάλη τῆς τοῦ Χριστοῦ παρουσίας ἡ δωρεά. *Major nunc virtus ostendenda est, quia multa nunc spiritus effusa est gratia, et ingens donum est Christi adventus.* Similia habet idem oratione, *Esse ex neglectu vitia; et de jejuniis tertio; et ad Romanos* vi. 14, et vii. 5. Adde *Irenæum*,

Lib. iv. cap. xxvi. Scriptor *Synopseos Sacræ Scripturæ*, quæ inter opera est Athanasii, de capite quinto Matthæi agens, ἐπιτελεῖ τὰ ἐν τῷ νόμῳ ἐντολαίς, *intensiora facit hic Christus legis præcepta.* [Tom. II. pag. 122. A. 1696].

^q *Et altera de decimis*] Sic lege hac apud Christianos utitur Irenæus, Lib. iv. cap. xxxiv. et Chrysostomus sub finem capitis ultimi prioris ad Corinthios, et ad Ephesios ii. 10.

ciples, that, at least, if not more, is due from Christians. The foundation of this remark is this: that the virtues which are required of Christians, as humility, patience, kindness, are required in a greater degree than they were under the Jewish Law: and that with good reason; because the heavenly promises are more and more clearly given in the Gospel. And hence, the Old Law is declared not to have been *perfect*, nor *faultless*: and Christ is called *the end of the Law*; and the Law *a schoolmaster to lead us to Christ*. [See the references in the text].

For example, the Old Law concerning the Sabbath, and the Law concerning Tithes, shew that Christians are obliged to give up not less than a seventh part of their time to divine worship; and not less than a tenth part of their goods for the support of those who minister in sacred things, and the like pious uses.

CAPUT II.

AN BELLARE UNQUAM JUSTUM SIT.

- | | |
|---|---|
| <p>I. <i>Jus naturæ bello non repugnare, probatur rationibus :</i></p> <p>II. <i>Historia.</i></p> <p>III. <i>Consensu.</i></p> <p>IV. <i>Jus gentium non repugnare bello probatur.</i></p> <p>V. <i>Jus divinum voluntarium, ante Evangelii tempus, bello non repugnare probatur, cum solutione objectionum.</i></p> <p>VI. <i>Ad quæstionem, an bellum cum jure Evangelico pugnet, præmonita.</i></p> | <p>VII. <i>Argumenta pro negante sententia ex sacris literis.</i></p> <p>VIII. <i>Solutio argumentorum ex sacris literis pro parte agente.</i></p> <p>IX. <i>Examinatur veterum Christianorum circa hanc rem consensio.</i>
 <i>Negans privatim consilio potius, quam præcepto nixa, reprobatur.</i></p> <p>X. <i>Affirmans, publica Ecclesiæ auctoritate, consensu, et temporum usu confirmatur.</i></p> |
|---|---|

VISIS Juris fontibus, ad primam ac generalissimam veniamus quæstionem, quæ hæc est, an bellum aliquod justum sit, sive, an bellare unquam liceat.

I. 1 Hæc autem ipsa quæstio, ut et aliæ quæ deinceps sequentur, ad jus naturæ primum exigenda est. M. Tullius Cicero tum tertio de Finibus, tum aliis in locis, ex Stoicorum libris erudite disserit, esse quædam prima naturæ, Græcis *τὰ πρῶτα κατὰ φύσιν*, quædam consequentia, sed quæ illis primis præferenda sint. Prima naturæ vocat, quod simulatque natum est animal, ipsum sibi conciliatur et commendatur ad se conservandum, atque ad suum statum, et ad ea quæ conservantia sunt ejus status diligenda: alienatur autem ab inte-

[cap. 5.]
Gell. xii. 5.

CHAPTER II. *Whether War ever be just.*

HAVING seen what are the fountains of *Jus* or of Law, let us come to the first and more general question, which is this: Whether any war be just; or, Whether it ever be lawful to make war.

I. 1 This question, and others which will follow, are first to be treated with reference to Natural Law. Cicero repeatedly speaks of certain First Principles, and certain other truths, the consequences of these, but of higher value than those. There is, according to him, a First Principle of Self-preservation. An animal, from its birth, is urged to care for and preserve itself, to choose the means of preserving its good condition, to shun destruction, and every thing which leads to its destruction. Thus there is no one who does not prefer to have the

ritu iisque rebus, quæ interitum videantur afferre. Hinc etiam ait fieri, ut nemo sit, quin cum utrumvis liceat, aptas malit et integras omnes partes corporis, quam easdem usu imminutas aut detortas habere: primumque esse officium, ut se quis conservet in naturæ statu, deinceps ut ea teneat, quæ secundum naturam sint, pellatque contraria.

2 At ^apost hæc cognita sequi notionem convenientiæ rerum cum ipsa ratione quæ corpore est potior; atque eam convenientiam, in qua honestum sit propositum, pluris faciendam, quam ad quæ sola primum animi appetitio ferebatur; quia prima naturæ commendent nos quidem rectæ rationi, ^bsed ipsa recta ratio carior nobis esse debeat quam illa sint a quibus ad hanc venerimus. Hæc cum vera sint et ab omnibus, qui judicio sano sunt præditi, facile sine alia demonstratione assensum impetrent; sequitur in examinando jure naturæ primum videndum quid illis naturæ initiis congruat, deinde veniendum ad illud, quod quanquam post oritur, dignius tamen

^a *Post hæc cognita sequi notionem convenientiæ rerum cum ipsa ratione* Seneca, ep. CXXIV: *quemadmodum omnis natura bonum suum nisi consummata non profert, ita hominis bonum non est in homine, nisi cum in illo ratio perfecta est.*

^b *Sed ipsa recta ratio carior nobis esse debeat, quam illa sint a quibus ad hanc venerimus* Seneca, ep. LXXVI: *Id in quoque optimum est, cui nascitur, quo censeatur; in homine optimum quid est? Ratio. vide et ep. cxxi. et cxxiv. Juvenalis, Satyra xv:*

parts of his body sound and whole, rather than maimed and distorted. The first business of each is to preserve himself in the state of nature; the next, to retain what is according to nature, and to reject what is contrary to it.

2 After this Principle, there follows a notion of the Agreement of things with Reason, which is superior to the body; and this Agreement, in which what is reasonable (*honestum*) becomes our object, is seen to be of more importance than those things to which alone the first impulse of appetite tended. The first Principle [of self-preservation] commends us to Right Reason; but Right Reason ought to be dearer to us than those things by which we were first led to use it.

This is allowed by all who are of sound mind, without demonstration. Hence in examining what agrees with Natural Law, we must first see what agrees with that first principle of Self-preservation; and afterwards proceed to that which, though subsequent in origin, is of greater dignity; and must not only accept it, if it be offered, but seek it with all care.

3 This object, what is reasonable, (*honestum*), has different ranges in different cases, according to the diversity of the matter. Sometimes

est; neque sumendum tantum, si detur, sed omni modo expetendum.

3 Hoc ipsum vero, quod honestum dicimus, pro materiæ diversitate, modo (ut ita dicam) in puncto consistit, ut si vel minimum inde abeas, ad vitium deflectas; modo liberius habet spatium, ita ut et fieri laudabiliter, ¹et sine turpitudine omitti aut aliter fieri possit, ferme quomodo ab hoc esse ad hoc non esse statim fit transitus; at inter aliter adversa, ut album et nigrum, reperire est aliquid interpositum, sive mixtum, sive reductum utrinque. Et in hoc posteriori genere maxime occupari solent leges tum divinæ, tum humanæ, ²id agendo, ut, quod per se laudabile tantum erat, etiam deberi incipiat. Supra autem diximus, de jure naturæ cum quæritur, hoc quæri, an fieri aliquid possit non injuste; injustum autem id demum intelligi quod necessariam cum natura rationali ac sociali habet repugnantiam.

4 Inter prima naturæ nihil est quod bello repugnet,

melius nos
Zenonis præcepta movent: neque enim omnia,
quædam,
Pro vita facienda movent.
(v. 106, seqq.)

¹ Exempli gratia, ubi nulla lege Civili vetatur Polygamia, non peccat equidem, qui plures una uxores ducit;

sed tamen, si una contentus sit, facit laudabiliter; idque *honestum est*, sensu illo latiori. Vide infra Lib. II. cap. v. § 9. J. B.

² Sic JUSTINIANUS Imp. in sua quadam constitutione se tale quid egisse gloriatur: *Licet*, inquit, *ii* [veteres] qui

it lies (as it were) in a point, so that if you depart from it by the smallest space, you fall into a fault: sometimes it has a wider field, so that the thing in question may be either done laudably, or omitted or done otherwise without pravity, according as we pass from the existence to the non-existence of certain conditions*. Between black and white, we find intermediate and mixed degrees, which approach the one or the other. And it is in this latter class of cases that laws, both divine and human, are mainly occupied; aiming at this, that what of itself was only laudable, may become a duty. As we have said above, that when we examine concerning Natural Law, we inquire whether anything can be done not unjustly; and then that is understood to be unjust, which has a necessary repugnance with a rational and social nature.

4 In the first principle of nature [Self-preservation] there is nothing which is repugnant to war: indeed all things rather favour it:

* Thus polygamy may be blameless, permitted, or criminal, according to the state of law. Monogamy may be laudable when polygamy is permitted; but may be elevated into a duty in a better state of society. W. W.

imo omnia potius ei favent. nam et finis belli, vitæ membro-
rumque conservatio, et rerum ad vitam utilium aut retentio
aut acquisitio, illis primis naturæ maxime convenit: et vi ad
eam rem si opus sit uti, nihil habet a primis naturæ dissen-
taneum, cum animantibus singulis vires ideo sint a natura
attributæ, ut sibi tuendis juvandisque sufficiant. Xenophon:
τὰ ζῶα ἐπίσταται τινα μάχην ἕκαστα, οὐδὲ παρ' ἐνὸς
ἄλλου μαθόντα ἢ παρὰ τῆς φύσεως omnia animantium
genera pugnam norunt aliquam, quam non aliunde quam a
natura didicerunt. In Halieuticon fragmento est: (ver. 7,
et seqq.)

Omnibus hostem,

Præsidiumque datum sentire et noscere teli
Vimque modumque sui.

Horatius dixerat: [II. Sat. i. 53.]

Dente lupus, cornu taurus petit; unde, nisi intus
Monstratum?

Lucretius vero amplius: [Lib. v. ver. 1032, et seqq.]

Sentit enim vim quidque suam, qua possit abuti.
Cornua nota prius vitulo quam frontibus exstant:
Illis iratus petit atque infensus inurget.

id permittebant [ut scil. Hæres, et qui in
ipsis potestate erant, testes essent in
Testamento] hoc jure minime abuti eos
debere suadebant: tamen nos... QUOD AB
ILLIS SUASUM EST, IN LEGIS NECESSITA-
TEM TRANSFERENTES, &c. Instit. Lib. II.
Tit. x. De Testam. Ordin. § 10. Vide
et COD. THEODOS. De Secundis Nup-
tiis, Lib. III. Tit. viii. Leg. ibique Doc-
tissimum GOTHOFREDUM, Tom. I. pag.
285. J. B.

* Illis iratus petit atque infensus
inurget] Martialis III. Epigr. 58:

Vitulusque inani fronte prurit ad pugnam

Porphyrus tertio De non esu animalium:
[pag. 268]: πρῶτον μὲν ἕκαστον οἶδεν

εἴτε δασυνέες ἐστὶν εἴτε ἰσχυρόν. καὶ τὰ
μὲν φυλάττεται, τοῖς δὲ χρῆται. ὡς
πάρδαλις μὲν ὀδοῦσιν. θυξὶ δὲ λέων καὶ
ὀδοῦσιν, ἵππος δὲ ὄπλῃ, καὶ βοῦς κέρασι.
novit quodque animantium quæ pars sui
infirma sit, quæ valida; illi cavet, hac
utitur; ut dentibus pardalis, leo et ungui-
bus et dentibus; equus ungula, bos cor-
nibus. Chrysostomus, de Statuis unde-
cimo: τὰ ἄλογα πάλιν ἐν τῷ σώματι
τὰ ὅπλα ἔχει, οἷον ὁ βοῦς τὰ κέρατα,
τοὺς ὀδόντας ὅς οὐκ ἄγριος, τοὺς θυ-
ξας ὁ λέων. ἐμοὶ δὲ οὐκ ἐν τῇ φύσει
τοῦ σώματος τὰ ὅπλα κατέθετο ὁ
θεός, ἀλλ' ἔξω τοῦ σώματος, δεικνύς
ὅτι ἡμερον ζῶον ὁ ἀνθρώπος, καὶ ὅτι

for the end of war, the preservation of life and limb, and the retention
or acquisition of things useful to life, agrees entirely with that princi-
ple. And if force be requisite for this purpose, still there is in this
nothing at variance with nature; for all animals are provided by na-
ture with means for the very purpose of self-defence. So Xenophon,
Ovid, Horace, Lucretius. Galen observes that man is an animal

Quem sensum Galenus sic exprimit. Φαίνεται γοῦν ἕκαστον ἐκείνῳ τῷ μέρει τοῦ σώματος ἀμυνόμενον, ὃ τῶν ἄλλων ὑπερέχει· μῶσχος μὲν κυρίττων πρὶν φύσαι τὰ κέρατα, πῶλος δ' ἵππου λακτίζων, οὐδέπω στερεαῖς ταῖς ὀπλαῖς, ὥσπερ γε τὸ μὲν σκυλάκιον δάκνειν ἐπιχειροῦν, κἄν μηδέπω κρατεροῦς ἔχη τοὺς ὀδόντας. *Videmus animantium quodque eo ad sui tutelam uti quo maxime valet. Nam et vitulus nondum enatis cornibus ea parte minatur, et equulus nondum firmatis ungulis calcitrat, et catellus dentibus nondum robustis morsitat.* Idem Galenus de usu partium primo, hominem animal esse ait ad pacem bellumque natum, cui arma quidem agnata non sint, ^dsed apta armis parandis ac tractandis manus: qua etiam pro armis uti sponte sua nec aliunde id edoctos infantes videmus. Sic et Aristoteles de partibus animalium quarto, capite x. manum homini ait esse pro hasta, pro ense, et pro armis quibuscumque, quia omnia potest sumere ac tenere.

5 Recta autem ratio ac natura societatis, quæ secundo ac potiore loco ad examen vocanda est, non omnem vim inhibet, sed eam demum quæ societati repugnat, id est, quæ jus alienum tollit. Nam societas eo tendit ut suum cuique saluum sit communi ope ac conspiratione. Quod facile intel-

οὐκ εἰς τοὺς τῶν ὅπλων τούτων καιροῖς. καὶ γὰρ πολλάκις μὲν αὐτὸ ἀποτίθημι, πολλάκις δὲ μεταχειρίζομαι ἵν' οὖν ἐλευθέρος ᾗ καὶ ἀπολελυμένος, καὶ μὴ διηνεκῶς ἀναγκάζωμαι βαστάζειν τὰ ὅπλα, ἐποίησεν αὐτὰ κεραισμένον τῆς φύσεως εἶναι τῆς ἐμῆς· quæ postrema optime conveniunt cum illis, quæ ex Galeno in contextu sequuntur. Hoc enim dicit: *Ratione quæ caret, arma in ipso habent corpore, ut bos cornua, dentes aper, ungues leo. At mihi non in corporis natura Deus arma posuit, sed extra corpus; hoc ipso ostendens manu etum animal esse hominem, neque semper tantum armorum mihi esse tempus. Nam*

telum sæpe depono, resumō interdum. *Ut igitur liberior solutiorque sim, neque semper cogar portare arma, fecit ea sejuncta esse a mea natura.* [Tom. vi. pag. 587].

^d *Sed apta armis parandis ac tractandis manus, qua etiam pro armis uti sponte sua nec aliunde id edoctos infantes videmus* Cassiodorus de Anima: *Et quoniam neque cornu, neque dente, neque fuga (sicut alia animalia) corporis humani forma se prævalet vindicare, robustus illi thorax, brachiaque concessa sunt: ut illatam injuriam manu defenderet, et objectu corporis quasi quodam clypeo vindicaret.* [Pag. 296].

born for peace and war, not born with weapons, but with hands by which weapons can be acquired. And we see infants, without teaching, use their hands for weapons. So also Aristotle. [See the passages in the text.]

5 Again, Right Reason and the nature of Society, which are next to be considered, do not prohibit all force, but that only which is

ligi potest locum habiturum; etiamsi dominium (quod nunc ita vocamus) introductum non esset: nam vita, membra, libertas, sic quoque propria cuique essent, ac proinde non sine injuria ab alio impeterentur. Sic et rebus in medio positis uti, et quantum natura desiderat eas absumere, jus esset occupantis: quod jus qui ei eriperet, faceret injuriam: hoc ipsum autem nunc, postquam ex lege aut usu dominium formam suam accepit, multo intelligitur facilius: quod exprimam Tullii

De Offic. III. 5. *verbis: Ut si unumquodque membrum sensum suum haberet, ut posse putaret se valere si proximi membri valetudinem ad se tradurisset, debilitari et interire totum corpus necesse est: sic, si unusquisque nostrum rapiat ad se commoda aliorum, detrahatque quod cuique possit, emolumenti sui gratia, societas hominum et communitas evertatur necesse est: nam sibi ut quisque malit quod ad usum vitæ pertineat quam alteri acquiri, concessum est non repugnante natura, illud natura non patitur, ut aliorum spoliis nostras facultates, copias, opes augeamus.*

6 Non est ergo contra societatis naturam sibi prospicere, atque consulere, dum jus alienum non tollatur: ac proinde nec vis, quæ jus alterius non violat, injusta est: quod

De Offic. I. 11. *idem Cicero ita extulit: Cum sint duo genera decertandi, unum per disceptationem, alterum per vim, cumque illud*

³ Locus Berosi refertur a JOSEPHO, *Antiq. Jud.* Lib. I. cap. 2, (cap. vii. § 2). *J. B.*

⁴ Aut potius veteris Poëtæ, qui nomen Orphæi adsumsit. Exstat fragmentum apud CLEMENTEM ALEXAN-

repugnant to Society; that is, that which is used to attack the Rights of others. For Society has for its object, that every one may have what is his own in safety, by the common help and agreement. Which consideration would still have place, even if property were not introduced: for even then, each one would have a property in his life, limbs, liberty; and these could not be attacked without wrong done to him. And also to use things which lay in common, and to take as much of them as nature should require, would be the right of the person who first took occupation of them; and he who should prevent the exercise of this Right, would do the occupier wrong. And this is much more easily understood now, when property has taken a shape by law or usage: as Cicero says. [See the passage in the text.]

6 Therefore it is not contrary to the nature of Society to take care of the future for one's self, so that the Rights of others be not infringed: and thus, even force, which does not violate the Right

proprium sit hominis, hoc belluarum, confugiendum est ad posterius si uti non licet superiore. Idem alibi: Quid est quod contra vim fieri sine vi possit? Apud Ulpianum est: Vim vi repellere licere Cassius scribit, jus natura comparatur, apparet autem, inquit, ex eo arma armis repellere licere. Ovidius dixerat (De Art. Am. iii. 492):

Epist. Fam. lib. 3.

Lib. 1. § 37. vim vi. D. de vi et vi armata.

Armaque in armatos sumere jura sinunt.

II. 1 Id quod dicimus, non omne bellum juri naturæ adversari, probatur amplius ex sacra historia. Nam cum adversus Reges quatuor, qui Sodoma diripuerant, Abrahamus cum ministris ac foederatis suis armatus victoriam reportasset, Deus per sacerdotem suum Melchisedecum factum ejus probavit. Ita enim illi Melchisedecus: *Laus sit Deo altissimo, qui tradidit hostes tuos in manum tuam*, Gen. xiv. 20. At ceperat arma Abrahamus, ut ex historia apparet, sine speciali Dei mandato: fretus igitur jure naturæ vir non sanctissimus tantum, sed et sapientissimus, etiam extraneorum ³ Berosi atque ⁴ Orphei testimonio. Historia septem populorum quos Israelitis excindendos Deus tradidit, non utar: fuit enim ibi mandatum speciale ad exequendam rem a Deo judicatam in populos maximorum criminum reos: unde hæc bella in sacris literis Dei bella proprie nominantur, quippe Dei jussu non humano arbitrio suscepta. Ad rem magis pertinet

PRIMUM, *Strom. Lib. v. [p. 723] et apud EUSEBIUM, Prepar. Evangel. xiii. 12: Tractatum De Verit. Rel. Christ. Lib. 1. § 15. et in Matth. v. 31, sub fin. J. B. unde Auctor noster ipse attulit, Not. in*

of another, is not unjust. So Cicero, Ulpian, Ovid. [See the passages.]

II. 1 Our doctrine, that all war is not contrary to Natural Law, is further proved from the sacred history. Abraham made war upon the four kings who had plundered Sodom, and was thereupon blessed by Melchisedec. This he did without the special mandate of God, as appears by the history: he must therefore have been justified by the Law of Nature: for he was a most holy and wise man, as even heathen authors declare. I do not use the history of the seven people, whom God gave up to be rooted out by the Israelites: for the Jews had a special command for thus dealing with people guilty of enormous crimes; whence these wars are in Scripture called the wars of the Lord, as being undertaken by the command of God, and not by the will of man. An example more to the purpose is that in the Amalekites: Jews, under Moses and Joshua, resisted the attack of the Amalekites:

quod Amalecitas vim sibi inferentes Hebræi, ducibus Mose ac Josua, armis repulerunt, Exod. xvii. Quod Deus ante factum non jusserat, post factum probavit.

2 Sed et leges generales ac perpetuas de modo gerendi belli Deus populo suo præscripsit Deut. xx. 10, 15, eo ipso ostendens justum bellum etiam sine mandatu speciali suo esse posse, nam aperte ibidem causam septem populorum ab aliorum populorum causa distinguit: ac cum de justis causis belli suscipiendi nihil ibidem edicat, eo ipso ostendit eas naturaliter satis esse manifestas: qualis causa tuendorum finium in bello Jephthæ adversus Ammonitas Jud. xi. violatorum legatorum in bello Davidis adversus eosdem, 2 Sam. x. Simul notandum quod dicit divinus ad Hebræos scriptor, Gedeonem, Baracum, Samsonem, Jephthen, Davidem, Samuelem, atque alios per fidem debellasse regna, invaluisse in bello, exercitus exterorum vertisse in fugam, xi. 33, 34, quo loco, ut istius dissertationis series docet, in fidei nomine includit persuasione, qua id quod fit, Deo placere creditur. Sic et Davidem sapiens femina ait præliari Dei prælia, 1 Sam. xxv. 28, id est pia ac justa.

III. 1 Probatur idem quod dicimus omnium gentium ac præcipue sapientum consensione. De vi qua vita defenditur notus Ciceronis locus, ipsi naturæ testimonium perhibens:

* *Omnis honesta ratio esset expediente salutis* Seneca: *Tutela certissima ex proximo est, sibi quisque permissus est.* [ep. cxxi.] Quintilianus vii. cap. ii: *Primum in omni genere debet esse defensio, quia natura potior est salus nos-*

tra, quam adversarii perniciēs. [Ubi tamen locus sese ita habet: *Quo in genere semper prior esse debet defensio: Primum, quia &c.*] Bene ergo in Trachiniis Sophocles [v. 281, 282]:

(Exod. xvii. 8), which God did not command beforehand, but approved when it was done.

2 But further, God prescribed to his people general and perpetual laws concerning the mode of carrying on war (Deut. xx. 15): shewing plainly by this that a war may be just, without a special mandate: for the case of the nations of Canaan is here expressly distinguished from the case of other nations. And inasmuch as nothing is there said as to what are just causes of war, this shews that they are assumed to be known by the light of nature. Thus we have Jephthah's war against the Ammonites concerning the occupation of land (Judges xi. 13): David's war against the same people for the insult done to his ambassadors (2 Sam. x. 4): so the Apostle to the Hebrews (xi. 32) speaks of Gideon and Barak and Samson and

Est hæc non scripta, sed nata lex, quam non didicimus, Pro Milone, A.
accepimus, legimus, verum ex natura ipsa arripuimus,
hausimus, expressimus, ad quam non docti, sed facti, non
instituti, sed imbuti sumus: ut si vita nostra in aliquas
insidias, si in vim, in tela aut latronum aut inimicorum
incidisset, omnis honesta ratio esset expediendæ salutis.
Item: Hoc et ratio doctis, et necessitas barbaris, et mos *ibid. 11.*
gentibus, et feris natura ipsa præscripsit, ut omnem semper
vim, quacumque ope possent, a corpore, a capite, a vita
sua propulsaret. Caius Jurisconsultus: *adversus periculum* *L. Itaque 4.*
naturalis ratio permittit se defendere. Florentinus Juris- *Princ. D. ad*
consultus: Jure hoc evenit, ut quod quisque ob tutelam *1. Aquil.*
corporis sui fecerit, jure fecisse existimetur. Josephus: *Lib. iii. ut*
φύσεως γὰρ νόμος ισχυρὸς ἐν ἅπασιν, τὸ ζῆν ἐθέλειν· διὰ *vim D. de*
τοῦτο καὶ τοὺς φανερώς ἀφαιρουμένους ἡμᾶς τούτου, πολε- *Just. et Jure.*
μίους ἡγοούμεθα. Est enim naturæ lex illa, quæ in omni- *De Bello Jud.*
bis valet, ut velint vivere, idque ipsum est quapropter eos, *Lib. iii. 8. § 5.*
qui vita manifeste nos volunt spoliare, hostes censemus.

2 Adeoque manifestam æquitatem hoc habet, ut in
 bestiis etiam, quæ juris non rem ipsam ut diximus, sed um-
 bram habent quandam; distinguamus inter vim, quæ injuriam
 infert, et quæ propulsat. Nam cum dixisset Ulpianus, animal
 'quod sensu, id est rationis usu, caret, non posse injuriam

Lib. 1. D. et
quadr. paup.
§ 1. Ad: 1. et
§ Cum arto-
lea. 11. Adde
Ex. xxi. 22.

οὐ γὰρ ἀφαιρῶντες ἡμῖν αὐτοὺς,
Ζεὺς ὁ δὲ συνέγνω σὺν ἱεῶσι χειρονομήν.
nam et se ipse tutasset palam,
Veniam dedisset jure pugnantī Deus.

Vide et Wisigothorum legem Lib. vi.
 tit. iv. cap. 6.

' Quod sensu, id est rationis usu, ca-
ret] Similem in modum Seneca de feris
 loquitur: *Adeo etiam quæ extra intellec-*
tum atque æstimationem beneficii sunt
posita, assiduitas tamen meriti pertinacis
evincit. Vide totum locum de beneficiis

Jephthah and David and Samuel and others, who through faith sub-
 dued kingdoms, waxed valiant in fight, turned to flight the armies of
 the aliens: when, as the context shews, "faith" includes the belief that
 what is done is pleasing to God. [The quotation 1 Sam. xxv. 28
 should have come in earlier.]

III. 1 What we say is proved by the consent of all nations, and
 especially of wise men. There are the noted passages in Cicero's
 Oration for Milo, in which he appeals to the testimony of nature for
 the right of self-defence. To the same purpose Josephus the his-
 torian, Caius and Florentinus the jurists. [See the quotations.]

2 The equity of this is so manifest, that even in brute animals,
 among which, as we have said, there are no rights, but only a shadow
 of them, we still distinguish between force used in committing injury,

fecisse, mox tamen subjungit, cum arietes vel boves commississent, et alter alterum occidisset, Q. Mutio auctore distinguendum, ut si quidem is perisset qui aggressus erat, cessaret actio; si is, qui non provocaverat, competeret actio. Cui explicando serviet illud Plinii: *“Leonum feritas inter se non dimicat, serpentum morsus non petunt serpentes; sed si vis inferatur, nulla est cui non sit ira, non sit anima injuriæ impatiens, et prompta, si noceas, ad se defendendum alacritas.*

IV. 1 De jure naturali ergo, quod et gentium dici potest, satis constat eo bella non omnia improbari.

2 Jure autem gentium, voluntario itidem, non dam-nari bella satis nos docent historiæ, et omnium populorum leges ac mores. Imo *“jure gentium introducta esse bella* dixit Hermogenianus: quod paulo aliter quam vulgo accipi solet interpretandum censeo: nempe ut certa bellorum forma a jure gentium sit introducta, quam formam quæ habeant bella, ea peculiares ex jure gentium effectus consequantur: *“unde*

L. Ex hoc
jure S. D. de
Just. et Jure.

libro i. cap. iii. et compara quæ ad præ-sationem ex Philone posuimus, § 7.

*“*Prima quidem verba istius loci le-guntur apud PLINIUM, *Hist. Natur.* Lib. vii. *Præfat.* in fine. Verum reli-qua, ab illis, *Sed si vis inferatur*, &c. non ibi exstant, nec alibi, quod sciam,

apud eundem Auctorem. Adeo ut in unum compegerit Grotius duo loca diversorum Scriptorum, dum scilicet ex-scribit alios, qui ita juncta adferunt: sic enim FRANCIS. CONNANUS, *Comm. Jur. Civ. Lib. i. cap. iv. num. 8.* MARC. LYCKLAMA, *Membran. Lib. vii.*

and in repelling it. Thus Ulpian, after saying that an animal which is devoid of reason cannot commit wrong, still adds, that if rams or bulls fight, Q. Mutius had ruled that a distinction was to be made, and that if the one who had been the aggressor was killed, the action would not lie; but if the one who had given no provocation was killed, the action was good. [The misquotation from Pliny adds nothing to the argu-ment.]

IV. 1 By Natural Law, then, [*Jure naturali* or *Jure gentium*] it is plain that all wars are not condemned.

2 That by the voluntary or instituted Law of nations [see chap. i. § ix. 2] wars are not condemned, we have evidence enough in the his-tories, laws and customs of all nations. Indeed Hermogenianus has said that wars were introduced *Jure gentium*, by Natural Law: which we are to understand thus: that by the *Jus gentium* a certain form of war was introduced, so that wars which take this form, have, *jure gen-tium*, certain effects. And hence we have a distinction, of which we shall afterwards make use, into a war formal according to *Jus gentium*,

distinctio nascitur, qua utendum nobis erit infra, in bellum Lib. III. 2.
 solenne juris gentium, quod et justum, id est plenum, dicitur,
 et non solenne, quod tamen non ideo justum esse desinit, id
 est juri congruens. Nam aliis bellis, modo æqua subit causa,
 jus gentium non adiasit quidem, sed nec resistit, ut infra
 latius explicabitur. *Jure gentium* (inquit Livius) *ita com-* Lib. XIII. 41.
paratum est, ut arma armis propulsentur. Et Florentinus num. 11.
 jus esse gentium ait, ut vim atque injuriam propulsemus, ut
 corpus nostrum tutemur. L. ut vim. 3.
D. de Just.
et Jure.

V. 1 De jure divino voluntario major est difficultas. Neque hic obijciat quisquam jus naturæ esse immutabile, ac proinde a Deo nihil in contrarium potuisse constitui: id enim verum est in iis, quæ jus naturæ vetat aut præcipit; non in iis, quæ jure naturæ licent tantum: nam quæ ejus sunt generis, cum proprie juris naturæ non sint, sed extra jus naturæ, et vetari possunt et præcipi.

2 Solet ergo primum a nonnullis contra bellum adferri lex data Noë ejusque posteris, ubi Deus sic loquitur, Gen. ix.

Eclog. XLII. pag. 394. Simile exemplum videmus infra, ad Lib. II. cap. II. § 13. Nota ult. Auctoris. J. B.

§ *Jure gentium introducta esse bella*
 Scriptor vitarum illustrium in Themistocle: *Professus est Athenienses suo consilio, quod communi jure gentium fa-*

cere possent, Deos publicos suosque patrios ac penates, quo facilius ab hoste possent defendere, muris sepiisse. [CORN. NEPOS, cap. VII. num. 4].

* Non videtur de distinctione illa cogitasse Jurisconsultus: sed hoc velle tantum, regulas, quæ in Bello observan-

which is also called a just or legitimate war, a complete war; and informal war, which may still be legitimate or just [in a more general sense,] that is, agreeable to justice. Informal wars, if there be a reasonable cause for them, are not supported by *Jus gentium*, but neither are they resisted by it, as will hereafter be shewn. Livy and Florentinus say that *Jus gentium* directs us to repel force by force. [See the passages.]

V. 1 Concerning Instituted Divine Law [Chap. I. § xv. 1] there is more difficulty. Nor is the objection valid, that Natural Law is immutable, and therefore cannot be changed, even by God: for this is true as to what is commanded or forbidden by Natural Law, but not as to what is only permitted. Things of that kind are not properly under Natural Law, but extraneous to it, and may be forbidden or commanded [by Instituted Law].

2 The first passage usually brought from Scripture, to shew that wars are unlawful, is the law given to Noah (Gen. ix. 5, 6). What is there said, *Your blood of your lives I will require, at the hand of man*

5, 6. *Quin etiam sanguinem vestrum, id est animarumstrarum, reposcam: ab omni bestia reposcam eum: atque etiam de manu hominis alterius, utpote fratris, reposcam hominis animam. Quisquis effuderit sanguinem hominis, qui est in homine, sanguis ejus effundetur: quia hominem ad effigiem suam fecit Deus.* Hic ergo quidam illud, quod de reposcendo sanguine dicitur, generalissime intelligunt, et alterum de effundendo vicissim sanguine, comminationem esse volunt, non approbationem: quorum neutrum mihi se persuadet. Nam interdictum de sanguine non effundendo latius non patet quam quod in lege est, *Non occides*; quod neque capitalibus suppliciis, neque bellis obstitisse manifestum est. Lex ergo tam hæc, quam illa, non tam novi aliquid constituit, quam jus naturæ prava consuetudine oblitteratum declarat atque repetit: unde verba illa intelligenda in eo sunt sensu, qui vitium includit: sicut homicidii nomine non quamvis hominis cædem intelligimus, sed destinatam, et innocentis. Quod vero sequitur de sanguine vicissim effundendo, videtur mihi non factum nudum, sed jus continere.

3 Rem ita explico. Natura non iniquum est, ut quantum quisque fecit mali, tantundem patiatur, juxta illud, quod^b Rhadamanthi jus dicitur:

Εἴτε πάθος ῥά τ' ἔφεξε δίκη καὶ λῆϊα γένοιντο.

Quæ fecit si quisque ferat, jus fiet et sequum.

tur, ut justum habeatur, ex præceptis naturalis Rationis constitutas fuisse et inductas. Talibus enim naturalis Rationis dictatis censetur Jus gentium, ex mente veterum. *J. B.*

^b *Rhadamanthi jus*] Apud Apollodorum, Lib. 11. Νόμος 'Ραδάμανθου' δε δὲ ἀμύνεται τὸν χειρῶν δόλικον ἀρξάντα δθῶον εἶναι. *Lex Rhadamanthi:*

si quis se ultus sit de eo, qui prior vim intulerit, impune id ferat. (Cap. iv. § 9).

⁷ Vide *De Legib.* Lib. ix. Tom. 11. pag. 864, et seqq. *J. B.*

¹ *Leves fuisse pœnas*] Servius ad primum librum *Æneidos*: (vers. 136): *Luetis: persolvētis. Et hic sermo a pecunia descendit: antiquorum enim pœnæ omnes pecuniariæ fuerunt.* Et ad 11-

will I require it, some understood in the most general sense; and what is said afterwards, *Whoso sheddeth man's blood, by man shall his blood be shed*, they regard as a threatening, not an approval. I cannot assent to either opinion. The interdict concerning the shedding of blood is not of wider extent than the command, *Thou shalt not kill*: and this, it is plain, does not prohibit either capital punishment or wars. And the one law, as well as the other, does not constitute any new offence, but only declares and repeats the Natural Law, obliterated by evil custom. Whence the words [*sheddeth man's blood*] are to be under-

Seneca pater hanc sententiam sic retulit: *Justissima patiendi vice, quod quisque alieno excogitavit supplicio, excipit suo.* Ex hujus naturalis aequitatis sensu Cain parricidii sibi conscius dixerat, Gen. iv. 14. *qui inveniet me, interficiet me.* Sed Deus primis illis temporibus aut ob hominum raritatem, aut quia paucis adhuc grassantibus minus opus erat exemplo, id quod naturaliter licitum videbatur edicto repressit, et contactum quidem ac commercium homicidæ defugit voluit, at vitam ei non eripi; quomodo et Plato ⁷in legibus constituit, et olim in Græcia usurpatum his versibus docet Euripides: [Orest. v. 511, seqq.]

Καλῶς ἔθεντο ταῦτα πατέρες οἱ πάλαι·
Εἰς ὀμμάτων μὲν ὄψιν οὐκ εἶων περᾶν,
Οὐδ' εἰς ἀπώστημ', ὅς τις αἰμ' ἔχων κυρεῖ.
Φυγαῖσι δ' ὀρίουν, ἀνταποκτεῖναι δὲ μή.

Quam bene parentum provida ætas statuerat,
Ut cogeretur de via decedere,
Hominumque visu cæde patrata nocens,
Fugaque lueret triste, non letho, scelus!

Quo et illud pertinet Thucydidis: εἰκὸς τοπάλαι τῶν μεγίστων ἀδικημάτων μαλακώτερας κείσθαι αὐτὰς (τὰς ζημίας), παραβαιομένων δὲ τῷ χρόνῳ εἰς τὸν θάνατον αἱ πολλὰ ἀνήκουσι. *Credibile est antiquitus quamvis gravium delictorum ¹leves fuisse pœnas: sed cum ex progressu temporis contemnerentur, ventum ad mortem.* Lactantius: ²*Ad-* Lib. III. § 45.
Lactant.
Lib. II.

brum secundum: (vers. 229). *Expendere: tractum est a pecuniâ: nam apud majores pecuniarias pœnas constat fuisse, cum adhuc rudi ætate pecunie ponderaretur, quod ad capitis pœnam deinde usurpatum est.* Ad sextum: (vers. 20). *Pendere: tractum est a pecuniaria damnatione.* Memorat Plinius,

Historia Naturalis, Lib. VII. cap. lvi: primum capitis judicium in Areopago esse actum.

³ Locus est *Inst. Div.* cap. 10, num. 23, ubi agitur de Exsilibus, quibus, apud veteres Romanos, igni et aqua interdiceretur. J. B.

stood as including criminality in the act: as the word *homicide* does not mean any killing of a man, but the intentional killing of an innocent man. What is added, *his blood shall be shed* in turn, appears to me to imply, not the mere fact, but the Law of justice.

³ My explanation of the matter is this. It is naturally equitable that whatever evil any one has inflicted, the same he shall suffer, according to what is called the Law of Rhadamanthus. So Seneca. Cain, with a sense of this natural equity said (Gen. iv. 14), *Every one that findeth me shall slay me.* In the earliest times, however, for various

huc enim videbatur nefas, quamvis malos, tamen homines, supplicio capitis afficere.

4 Ab uno facto illustri sumta conjectura divinæ voluntatis in legem ivit, ita ut Lamechus quoque ^k simili facinore perpetrato impunitatem sibi ab hoc exemplo promiserit, Gen. iv. 24.

5 At cum jam ante diluvium, gigantum ætate, promiscua invaluisse cædium licentia, instaurato post diluvium humano genere, ne mos idem invalesceret, severius occurrendum Deus censuit: et repressa prioris sæculi lenitate, quod naturæ non iniquum esse dictabat, et ipse permisit, ^lut insons esset, qui homicidam occidisset: quod postea institutis judiciis summas ob causas ad judices solos restrictum est; ita tamen ut moris pristini vestigium manserit in jure ejus, qui occisum sanguine proxime attingeret, etiam post Mosis legem, qua de re infra fusius agetur.

6 Magnum habemus auctorem nostræ interpretationis Abrahamum, qui cum legem Noë datam non ignoraret, arma sumit in reges quatuor, ut quæ plane crederet cum ea lege non pugnare. Sic et Moses Amalecitis populum oppugnan-

^k *Simili facinore perpetrato*] Ant
potius, si quid simile perpetrasset: nam
hunc sensum ferunt verba quæ apud

Mosem.

^l *Ut insons esset, qui homicidam oc-*
cidisset] Josephus: *παρὰν μὲν τοι*

reasons, this was not enforced; the manlayer was indeed shunned by men, but not put to death: as Plato directs in his *Laus*: and as Euripides states the usage of Greece in his *Orestes*. So Thucydides; Lactantius.

4 The example of Cain was regarded as establishing a law, so that Lamech (Gen. iv. 24) promised himself impunity, from this example, after the like deed.

5 But since before the deluge, in the age of the giants, violence had become general, when after the deluge, God restored the race of man, he provided by increased severity against the recurrence of the evil: and repressing the lenity of the former time, he gave his permission to that which was naturally equitable, that he who slew a homicide should be blameless. Which afterwards, when tribunals for high crimes were instituted, was confined to the judges. Yet a vestige of the ancient usage remained in the Right of the avenger of blood, even under the Law of Moses, of which we shall hereafter speak.

6 We have a strong confirmation of this interpretation in Abraham, who, though he must have known the law given to Noah, took arms against the four kings. So Moses directed the Israelites to

tibus arma jussit opponi, naturæ scilicet jure usus: nam Deum de hac respeciatim consultum non apparet, Exod. xvii. 9. Adde jam, quod capitalia supplicia nec in homicidas tantum, sed et in alios facinorosos usurpata apparet, non modo apud populos extraneos, sed apud ipsos piæ doctrinæ alumnos, Gen. xxxviii. 24.

7 Nimirum conjectura divinæ voluntatis, ipsa naturali ratione adjuvante, a similibus ad similia processerat, ut quod in homicidam constitutum erat, in alios quoque eximie nocentes non iniquum videretur. Sunt enim quædam, quæ vitæ æquiparantur, ut existimatio, pudor virginalis, fides matrimonii, aut sine quibus vita tuta esse non potest, ut imperii societatem continentis reverentia: adversum quæ qui faciunt, ii homicidis meliores non videntur.

8 Huc pertinet vetus, quæ apud Hebræos exstat, traditio, leges plures Nosæ filiis datas a Deo, quæ non omnes a Mose narratæ sint, quia satis erat ad ipsius institutum, eas postea in lege peculiari Hebræorum esse comprehensas. Sic adversus nuptias incestas legem veterem, quamquam a Mose suo loco non memoratam, exstitisse apparet Levit. xviii. Inter ea

σφαγῆς ἀνθρωπίνης ἀπέχεσθαι καὶ καθαρεύειν φόνου καὶ δρασάντας τι τοιοῦτο κολάζεσθαι. *Edico ut a cæde* *humana pure habeantur manus: quod si quis cædem commiserit, pœnam ferat.* (Lib. i. cap. iii. § 8).

fight against the Amalekites, not specially consulting God on this point. Add to this, that capital punishments are applied not only to homicides, but to other criminals, not only among other nations, but in the chosen people of God. Gen. xxxviii. 24.

7 In fact men had proceeded from like to like, by the light of reason, in their conjecture of the divine will, and had judged that what was the appointed punishment of homicides was equitable also towards other great criminals. For there are things which are to man of no less value than life, as good fame, virginity, conjugal fidelity: and things without which life cannot be safe, as a reverence for the sovereign authority which holds society together: so that those who assail these objects are held as no better than homicides.

8 Connected with this is the tradition extant among the Jews, that there were given by God to the sons of Noah several laws; which are not all recorded by Moses, because it was enough for his purpose to give them afterwards as included in the particular law of the Hebrews. Thus it appears, Lev. xviii. 6, that there was an ancient law against marrying persons near of kin, though no such law

autem, quæ Noë liberis Deus edixit, hoc quoque aiunt fuisse, ut non homicidia tantum, sed et adulteria, et concubitus incesti, item violentæ rapinæ morte punirentur. Quod ipsum confirmant Jobi verba xxxi. 11.

9 Jam vero data per Mosem lex sanctionibus capitalibus rationes adjicit, quæ apud alios populos non minus quam apud Hebræum populum valent: ut Levit. xviii. 24, 25, 27, 28. Psal. ci. 5. Prov. xx. 8. Et peculiariter de homicidio dicitur terra non posse expiari nisi sanguine homicidæ fuso, Num. xxxv. 31, 33. Præterea absurdum cogitatu est, Hebræo populo indultum, disciplinam et salutem publicam ac singulorum munire pœnis capitalibus, ac se bello tueri, cæteris autem regibus gentibusque idem eodem tempore non licuisse: neque tamen reges eos aut gentes unquam a prophetis admonitos improbari a Deo usum capitalium suppliciorum ac bella omnia, sicut de aliis peccatis admoniti sæpe sunt.

10 Imo contra quis non credat, cum lex Moysis de judiciis expressam habuerit divinæ voluntatis imaginem, recte ac pie facturas fuisse nationes, quæ inde sibi exemplum pete-

* Vide Auctoris Tractatum *De Verit. Relig. Christ.* Lib. I. § 16, in fin. pag. 28. J. B.

¹ Vocem illam *quendam* addidi, quæ excidit in omnibus Editionibus, et quam deesse nemo non videt. J. B.

is previously mentioned by Moses. And the Jews say that among the laws given to Noah, were precepts that not only homicide, but adultery, incest, and robbery should be punished with death. And this is confirmed by Job, xxxi. 11; *This is an heinous crime: yet it is an iniquity to be punished by the judges.*

9 Moreover the law given by Moses gives reasons for capital punishments, which are valid among other nations as well as the Jews: as Lev. xviii. 24, &c., *Defile not yourselves, &c.* Psal. ci. 5, *Whoso privily slandereth his neighbour, him will I cut off.* Prov. xx. 8, *A king that sitteth in the throne of judgment scattereth away all evil with his eyes.* And especially concerning homicide, it is said, Num. xxxv. 33, *that the land cannot be cleansed of the blood that is shed therein but by the blood of him that shed it.*

Further, it is absurd to suppose that the Hebrew people were indulged with the privilege of protecting public and private interests by capital punishments, and defending themselves by war, and that other kings and nations at that time had no such privilege: and that, this being so, those kings and nations were yet never rebuked by God for the practice of capital punishment and of war, as they were often rebuked for other offences.

rent? quod certe Græcos, Atticos præsertim, fecisse credibile est: unde ⁹ tanta in jure veteri Attico, et quod inde sumtum est Romano xii. tabularum cum legibus Hebræis similitudo est. Sufficere hæc videntur, ut appareat legem Noë datam non eum habere sensum, quem volunt, qui bella omnia eo argumento impugnant.

VI. 1 Speciem majorem habent quæ ex Evangelio contra bellum adferuntur: in quibus examinandis non illud mihi sumam, quod sumunt multi, in Evangelio extra præcepta credendi et sacramentorum nihil esse quod non sit juris naturalis: id enim, quo sensu a plerisque sumitur, verum non puto.

2 Illud libens agnosco, nihil nobis in Evangelio præcipi, quod non naturalem habeat honestatem: sed non ulterius nos obligari legibus Christi, quam ad ea, ad quæ jus naturæ per se obligat, cur concedam non video. Et qui aliter sentiunt mirum quam sudent, ut probent quædam ¹ quæ Evangelio vetantur ipso jure naturæ esse illicita, ^m ut concubinatum, divortium, matrimonium cum pluribus fœminis. Sunt quidem hæc ejusmodi, ut eis abstinere honestius esse dicet ipsa ratio;

^m *Ut concubinatum, divortium*] Speculat huc illud Hieronymi: [*Ad Ocean.* Tom. I. p. 198. c.] *Aliæ sunt leges Cæ-*

sariæ, aliæ Christi: aliud Papinianus, aliud Paulus noster præcipit.

10 On the contrary, we must suppose that, as the law of Moses was the expression of the divine Will, the other nations would do well and piously to take example by that law: which it is probable that the Greeks, and especially the Athenians, did: whence arises the so great similarity of the old Attic Law, and the Laws of the Twelve Tribes therefrom derived, with the Laws of the Hebrews.

VI. 1 The arguments adduced against war from the Gospel are more specious: and in examining these, I shall not assume, as many do, that there is in the Gospel nothing, besides the precepts of belief and institution of the sacraments, which is not matter of Natural Law: for that, in the sense in which it is commonly understood, I do not believe.

2 I willingly acknowledge that nothing is commanded us in the Gospel which has not a natural reasonableness: but I do not see why I should grant that we are bound to nothing by the Laws of Christ beyond what we are bound to by the Law of Nature. And when men maintain the contrary, it is wonderful to see what pains they are compelled to take to prove that some things which are forbidden by the Gospel, are also unlawful by the Law of Nature; as concubinage, divorce, plurality of wives. These things are such that reason itself

at non talia ut absque lege divina nefas in illis appareat. Ad illud vero quod Christiana lex præcipit, ut alii pro aliis mortis periculo nos objiciamus, 1 Joh. iii. 16. quis dicat ipso ³ naturæ jure nos obligari? Justinus dictum est: τὸ κατὰ φύσιν βιοῦν, οὐδέπω πεπιστευκός ἐστιν ² secundum naturam vivere, ejus est, qui nondum credidit.

3 Sed ne illos quidem sequar, qui aliud sibi sumunt non exiguum, Christum scilicet in tradendis præceptis, quæ extant Matthæi v. et deinceps, interpretem tantum agere legis per Moysen datæ. Aliud enim sonant verba toties repetita, *Audistis dictum fuisse veteribus: Ego vero dico vobis*: quæ oppositio: sed et Syriaca et aliæ versiones ostendunt, illud *veteribus* significare, ad veteres, non a veteribus; ut *vobis* est, ad vos, non a vobis. Veteres autem illi non alii fuerunt, quam qui Moysi tempore vivebant: nam quæ ut veteribus dicta recitantur, non legis peritorum sunt, sed Moysi, aut verbo tenus, aut sensu. *Non occides*, Exod. xx. 13. *Quisquis occiderit, tenebitur judicio*, Levit. xxiv. 21. Num xxxv. 16, 17, 30. *Non mæchaberis*, Exod. xx. 14. *Quisquis dimiserit uxorem, det ei libellum divortii*, Deut. xxiv. 1. *Non pejerabis, sed reddes Domino, quæ juraveris*, Exod. xx. 7.

³ Quidni? si recte jus illud intelligamus. Vel exemplum Ethnicorum, qui pro patria se morti deoverunt, id refellit. Postulat omnino Societatis custodia, de qua Auctor noster in Prole-

gomenis, ut in certis quibusdam casibus nonnulli plurimorum salutem vitam suam donent. Adeoque ipsa obligatio Martyrii, qualis ab evangelio nobis imponitur, a Lege Naturæ ultimo deduci po-

dictates that it is better to avoid them; but not such that they are seen to be criminal without the divine law.

Again, who can say that such a Precept as that, 1 Joh. iii. 16, We ought to lay down our lives for the brethren: is binding by the Law of Nature? Justin Martyr says that to live according to nature is the condition of him who has not yet come to believe.

3 Nor shall I follow those who make another large assumption, that Christ in delivering the precepts, Matt. v. et sqq. is only speaking as the interpreter of the law given by Moses. For a different notion is suggested by the words so often repeated: *Ye have heard it said by them of old time: But I say unto you*. Where the apposition shews, which the Syriac and other versions express, that *veteribus* rather means *to them of old time* than *by them*; as *vobis* means *to you*, not *by you*. And these men of old time were those who lived at the time of Moses: for what is ascribed to them is not the dogmas of doctors of the law, but the doctrines of Moses, either in words or in

Num. xxx. 2. *Oculum pro oculo, dentem pro dente* (supple, reposcere liceat in iudicio) Levitic. xxiv. 20. Deuteron. xix. 21. *Diliges proximum tuum* (id est Israelitam) Levit. xix. 18. *et odio habebis inimicum tuum*, °puta septem populos, quibuscum amicitiam colere quorumque misereri vetantur, Exod. xxxiv. 11. Deut. vii. 1. His addendi Amalecitæ, in quos Hebræi jubentur bellum habere implacabile, Exod. xvii. 16. Deut. xxv. 19.

4 Sed ad intelligentiam verborum Christi omnino notandum, legem per Mosem datam dupliciter accipi: aut secundum id, quod commune habet cum aliis legibus, quæ ab hominibus condi solent, quatenus scilicet graviora delicta penarum aspectabilium formidine coercet, Hebr. xi. 2. et populum Hebræum hac ratione in statu civilis societatis continet, quo sensu dicitur νόμος ἐντολῆς σαρκικῆς, Hebr. vii. 16. et lex factorum, Rom. iii. 27. aut secundum id, quod legis divinæ est proprium, quatenus scilicet etiam mentis requirit puritatem, et actus aliquos, qui sine temporali poena omitti possunt: quo sensu vocatur νόμος πνευματικὸς, Rom. vii. 14. exhilarans animum, Psalm. xix. qui Latinis xviii. 9. Legisperiti et Pharisei priore illa parte contenti, secundam, quæ potior est,

test. J. B.

° *Secundum naturam vivere, ejus est, qui nondum credidit*] Locus Justinī est ad Zenam (pag. 389): idemque sensus apud Origenem in excerptis illis, quæ

Philocalia dicuntur. (Cap. ix. pag. 36).

° *Putat septem populos*] In hos odium lege permitti ait illustrissimus Abarbanel ad Deut. xxlii. 21.

sense: as appears by the examples. *Thou shalt not kill, &c. An eye for an eye, and a tooth for a tooth. Thou shalt love thy neighbour* (the Israelite), *and hate thine enemy*, the seven expelled nations, to whom the Jews were forbidden to shew mercy: to whom are to be added the Amalekites. [See the references.]

4 To the understanding of the words of Christ, it is to be observed that the Law given by Moses is taken in two senses: first, according to that which it has in common with other laws established by men, as restraining grave crimes by visible punishments, and keeping the Hebrew people in a state of civil society; in which sense, by it, *every transgression and disobedience received a just reward*, Heb. ii. 2; and in which sense, Heb. vii. 16, it is called *the law of a carnal commandment*; and Rom. iii. 27, *the law of works*: and secondly, as requiring also purity of mind, and some acts which may be omitted without temporal punishment, in which sense it is called *the spiritual law*, Rom. vii. 14, *rejoicing the heart*, Psalm xix. The Lawyers and Pharisees, con-

insuper habebant, neque inculcabant populo: quod verum esse non ex nostris duntaxat libris, sed ex Josepho quoque et magistris Hebræorum ostendi potest.

5 Sed etiam secundam hanc partem quod attinet, sciendum est, virtutes, quæ a Christianis exiguntur, etiam Hebræis aut commendari, aut præcipi, sed ^pnon præcipi in eo gradu ac latitudine, quo Christianis. Utroque autem hoc sensu Christus sua præcepta opponit veteribus, unde liquet, verba ejus non continere nudam interpretationem. Hæc autem sciri non ad hoc tantum, quod nunc in manu est, refert, sed et ad multa alia, ne legis Hebraicæ auctoritate supra quam æquum est utamur.

VII. 1 Omissis ergo argumentationibus, quæ minus se nobis probant, primum ac præcipuum testimonium, quo bellandi jus a Christi lege non plane tolli probamus, esto Pauli illud I ad Timotheum xi. 1, 2, 3. *Hortor ergo ante omnia,*

^p *Non præcipi in eo gradu ac latitudine]* Quædam huc pertinentia vide in notatis supra ad finem capitis primi. Egregius imprimis Chrysostomi locus de *Virginilate*, cap. xlv: τὸ μὲν γὰρ παλαιὸν οὐ τοσοῦτον ὑμῖν ἀρετῆς προέκειτο μέτρον, ἀλλὰ καὶ ἀμύνασθαι τὸν ἀδικούντα, καὶ ἀντιλοιδορεῖσθαι τῷ λοιδορουμένῳ, καὶ χρημάτων ἐπιμελήσεσθαι ἐξῆν, καὶ εὐορκούντα ὀμνύναι, καὶ ὀφθαλμὸν ἐξορύξαι ἀντὶ ὀφθαλμοῦ, καὶ μισεῖν τὸν ἐχθρὸν, καὶ οὕτε τροφῆν, οὕτε ὀργίλῃσθαι, οὕτε γυναῖκα τὸν μὲν ἐκβάλλειν, τὸν δὲ ἀντεισάγειν κεκάλυπτο, καὶ οὐ τοῦτο μόνον, ἀλλὰ καὶ δύο κατὰ ταῦτόν ὁμοῦ γυναῖκας ἔχειν

ὁ νόμος ἐπέτρεπε, καὶ πολλῇ καὶ ἐν τοῦτοις καὶ ἐν τοῖς ἄλλοις ἔπασιν ἡ συγκατάβασις ἦν· κατὰ δὲ τὴν τοῦ Χριστοῦ παρουσίαν πολλῇ στενωτέρᾳ γέγονεν ἡ ὁδός. Olim tanta nobis injuncta non erat virtutis mensura, sed et vindictam sumere de injuriarum inferente, et convitianti reddere convitium, et pecuniis studere licebat, sed et citra falsimoniam jurare, et pro oculo excutere oculum, et odio habere inimicum: quin nec deliciis frui, nec irasci, nec uxorem aliam ejicere, recipere aliam, vetitum erat. Parum dici: etiam duas eodem tempore uxores habere lex sinebat multaque et in his, et in aliis rebus erat

tented with the former part, regarded not the second part, which is better, nor inculcated it on the people. That this is true, we learn not only from the New Testament, but also from Josephus and the Hebrew doctors.

5 Yet even with regard to this second part, it is to be observed that the virtues which are required of Christians were either recommended or enjoined to the Hebrews; but they were not enjoined in the same degree and with the same breadth as to the Christians. And in both these respects [degree and breadth] Christ opposes his interpretation to that of the ancients; where it appears that his words do not contain a bare interpretation.

It is useful to know this, not only with reference to the point

ut fiant deprecationes, preces, interpellationes, gratiarum actiones pro quibusvis hominibus: pro regibus et quibusvis in eminentia constitutis: ut tranquillam ac quietam vitam degamus cum omni pietate ac sanctitate. Nam id bonum gratumque est apud Deum servatorem nostrum, qui omnes homines vult servari, et ad agnitionem veritatis venire. Tria enim hinc docemur: Gratum esse Deo, ut reges fiant Christiani: ut Christiani facti reges maneant: quod ita expressit Justinus Martyr: εὐχόμεθα τοὺς βασιλεῖς καὶ ἄρχοντας μετὰ τῆς βασιλικῆς δυνάμεως καὶ σώφρονα τὸν λογισμὸν ἔχοντας εὐρεθῆναι: hoc precamur, ut Reges et Principes simul cum regali potestate etiam sanam mentem consequantur: et in libro, cui nomen Constitutiones Clementis, precatur Ecclesia Ἱ Χριστιανὰ τὰ τέλη, id est, magistratus Christianos: deinde et hoc Deo gratum esse, ut Christiani reges Christianis aliis vitam tranquillam præstent.

temporum illorum indulgentia. At post Christi adventum multo arctior facta est via. (Tomo. vi.) Eodem libro, cap. lxxxiii: οὐ τὸ αὐτὸ τῆς ἀρετῆς ἀπαιτούμεθα μέτρον ἡμεῖς τε καὶ αἱνοί, non eadem virtutis mensura a nobis et ab illis exigitur. Idem in oratione Filium Patri æqualem, quæ est Tomo vi. ait in Evangelio esse ἐπὶ τασιν καὶ προσθήκην ἐντολῶν, præceptorum et intensiorem et adjectionem. (Pag. 717.)

¶ Ut tranquillam ac quietam vitam degamus cum omni pietate ac sanctitate] Seneca, Epistola lxxiiii, philosophus fideliter deditus falso ait contentores magistratum ac regum existimari. E

contrario, ait, nulli adversus illos gratiores sunt: nec immerito; nullis enim plus præstant, quam quibus frui tranquillo otio licet. Digna est quæ legatur epistola, ubi et hoc: Hujus pacis beneficium, ad omnes pertinentis, altius ad eos pervenit, qui illa bene utuntur.

Ἱ Χριστιανὰ τὰ τέλη, id est, magistratus Christianos] Nisi hic interpretari malis, Christianum vitæ exitum. [Locus est Lib. viii. cap. 36, ubi, quem admodum et cap. 6, ejusdem libri, ubi eadem verba reperiuntur, posteriori modo recte vertitur, in ed. Patrum Apostolic. 1724. Tom. ii. pag. 397 et pag. 421].

now in hand, but also to many other points, that we may not exaggerate the authority of the Hebrew law.

VII. 1 To proceed then to the passages which shew that war is not made unlawful by the law of Christ.

(1) The first is 1 Tim. ii. 1, 2, 3, *I exhort, therefore, that first of all supplications, &c.* We are here taught three things: that it is agreeable to God that kings be made Christians; that kings when made Christians continue kings; and that Christian kings enable other Christians to lead a quiet and peaceable life. So Justin Martyr mentions prayer for kings and princes; and in the Constitutions of Clement the Church prays for Christian Magistrates.

2 Quomodo vero? Alibi id explicat Rom. xiii. 4: *Dei minister est tuo bono: quod si feceris quod malum est, metue; non enim frustra gladium gerit: nam Dei minister est, vindex ad iram ei qui quod malum est fecerit.* ³ Jure gladii per complexionem omnis quidem coercitio intelligitur, quomodo etiam apud Jurisconsultos interdum; sed ita tamen, ut pars ejus summa, id est verus gladii usus, non excludatur. Huic loco illustrando non parum servit Psalmus secundus, qui quanquam in Davide suam habuit veritatem, plenius tamen et perfectius ad Christum pertinet: ut discere est Actor. iv. 25; xiii. 33; Hebr. v. 5. Is autem Psalmus reges omnes hortatur, ut Dei filium venerabundi suscipiant: hoc est, ut se ministros ei exhibeant, qua reges sunt scilicet, ut recte explicat Augustinus, cujus verba ad hanc rem pertinentia apponam: *In hoc reges, sicut eis divinitus præcipitur, Deo serviunt, in quantum reges sunt, si in regno suo bona jubent, mala prohibeant, non solum quæ pertinent ad humanam societatem, verum etiam quæ pertinent ad divinam religionem.* Et alibi: *Quomodo ergo reges Domino serviunt in timore, nisi ea, quæ contra jussa Domini fiunt, religiosa severitate prohibendo atque plectendo? Aliter enim servit qua homo est, aliter qua rex est. Mox: In hoc ergo serviunt Domino reges, in quantum sunt reges, cum ea faciunt ad serviendum illi, quæ non possunt facere nisi reges.*

Contr. Cres.
Gram. iii. 51.

Ad Bonif.
Epist. 50. cap.
185. num. 19.

³ Argumentum istud, ut et plura ex sequentibus, per se equidem et directe eo tantum pertinet, ut capitalia supplicia ab Evangelio non tolli probetur: verum per consequentiam hinc deduci

potest, neque bellum omne Christianis vetitum esse. Huc facit non tantum ratio ab Auctore adlata num. 18, istius paragraphi, sed etiam quod usus capitalium suppliciorum non minus videatur

2 But how do kings secure peace and tranquillity to their subjects? This he teaches, Rom. xiii. 4, *He is the minister of God to thee for good, &c.* The sword implies all controlling power, as also sometimes among the Jurists; but still, in such a manner that the highest kind of that power, the actual use of the sword, [that is, capital punishment and war,] is not excluded. This place is illustrated by Psalm ii., which though verified in David has a fuller accomplishment in Christ. [See the passages in Acts and Hebrews.] That Psalm exhorts the kings of the earth to *kiss the Son lest he be angry*: that is, to do him service in their capacity of kings. [See the passages quoted from Augustine.]

3 (2) The second passage is, that already partly cited, Rom. xiii. *There is no power but of God. The powers that be are ordained of God, &c.*: whence the apostle infers that we are to obey and honour the

II.

3 Secundum argumentum præbet nobis is ipse locus, cujus partem citavimus, ad Rom. xiii. ubi potestas summa, qualis est regia, a Deo esse dicitur, et Dei ordinatio vocatur; unde infertur, ei et parendum et honorem exhibendum; et quidem ex animo: et qui ei resistit, eum Deo resistere. Si ordinationis voce res intelligeretur, quam Deus tantum non vult impedire, quomodo se Deus habet circa actus vitiosos, jam inde nulla honoris, nulla obedientiæ, ad animum maxime pertinentis, obligatio sequeretur; nec quicquam diceret Apostolus, ubi hanc potestatem tantopere prædicat atque commendat, quod non latrociniis et furtis conveniret. Sequitur ergo, ut ordinata hæc potestas voluntate Dei approbante intelligatur; unde porro infertur, cum Deus sibi contraria non velit, hanc potestatem cum voluntate Dei per Evangelium revelata et omnes homines obligante, non pugnare.

4 Neque eliditur hoc argumentum eo, quod qui in imperiis erant eo tempore cum hæc Paulus scriberet, dicuntur alieni fuisse a Christiana pietate; nam primum id ita universim verum non est. Nam Sergius Paulus Cypri Proprætor Christo nomen pridem dederat, Actor. xiii. 12. ut jam taceam quod de *Edessenorum rege vetus fama tradidit, nonnihil forte falso inquinata, sed ut videatur ex vero originem trahere. Deinde non de personis quæritur, an impiæ fuerint, sed an illa functio in illis impia fuerit: quod dicimus ab Apostolo

[Euseb.
H. E. i. cap.
13.]

repugnare mansuetudini et clementiæ Christianæ, quam bellum: unde, si priora tamen licent, posterius illicitum non esse, efficitur. Vide quæ de capitalibus suppliciis ulterius dicentur infra,

Lib. ii. cap. 20. § 12. J. B.

* *Edessenorum*] Est Edessa in Osroëne. Nomen Abgari frequens illis locis. Apparet ex nummis, Tacito, Appiano, Dione tum in pridem editis, tum

powers that are ordained; and that, from our hearts; and that he who resisteth the power resisteth the ordinance of God. By ordinance we cannot understand merely what God will not prevent, as he permits bad actions: for such permission would not impose any obligation of honour or heartfelt obedience. On this supposition the Apostle, in speaking so highly of the powers that be, would give a reason which is equally true of thefts and robberies. It follows then that the powers thus ordained, are approved by God; and since God cannot approve contradictory things, that this power is not at variance with the will of God revealed by the Gospel, and obligatory on all men.

4 Nor is this argument refuted by the consideration, that the powers that be in St Paul's time, were not Christian. For in the first place, this is not universally true. Sergius Paulus, the Proprætor

negari, quando illam functionem dicit a Deo institutam etiam pro illo tempore, ac propterea honorandam etiam intra animi recessus, quibus proprie solus Deus imperat. Potuit ergo et Nero, et rex ille Agrippa, quem ad Christi religionem amplectendam Paulus tam serio invitat, Act. xxvi. Christo se subdicere, et retinere hic regiam, ille imperatoriam potestatem: quæ sine jure gladii et armorum intelligi nequit. Sicut ergo olim pia erant sacrificia secundum legem, quamvis ab impiis sacerdotibus celebrata; sic 'pia res est imperium, quamvis ab impio teneatur.

III. 5 Tertium argumentum petitur ex Joannis Baptistæ verbis, qui serio interrogatus a militibus Judæis (cujus gentis multa millia Romanis militasse ex Josepho et aliis scriptoribus manifestissimum est) quid haberent faciendum, ut iram Dei effugerent; non eos militia abire jussit, quod facere debebat si ea erat Dei voluntas, sed abstinere concussionibus et fallaciis, stipendiisque esse contentos, Luc. iii. 14. Ad hæc Baptistæ verba, cum apertam satis militiæ approbationem contineant, multi respondent, quæ Baptista præscripsit ita discre-

in novis excerptis, Capitolino. [Vide III. SPANHEM. *De Præst. et usu Numisma-*

tum, Diss. VIII. § 10, pag. 534, et seqq. Tom. I.]

of Cyprus, had become a Christian; not to mention the ancient story concerning the king of Edessa, perhaps distorted, but yet with a foundation of truth*.

But in the next place, the question is not whether the persons were impious, but whether their office was impious; which the Apostle denies, when he says that even at that time it was ordained of God, and therefore was to be honoured from the heart, which is God's peculiar dominion. And thus Nero and king Agrippa might have submitted themselves to Christ, and have retained respectively the imperial and the royal power; which could not have subsisted without the power of the sword and of arms. And thus as under the Old Law, sacrifices were pious, though celebrated by impious priests, so government is a pious office, though it be held by an impious man.

5 (3) The third argument is taken from the words of John the Baptist; who, when he was asked by the Jewish soldiers, (of which nation there were many thousands in the Roman army, as is manifest from Josephus and other writers,) What they should do, to avoid the wrath of God; did not tell them to cease to be soldiers, which he ought to have done if such were the will of God; but told them to abstain from extortion, and to be content with their wages.

* Barbeyrac remarks that the learned hold the story of Abgarus a 'mera fabula.'

pare a Christi præceptis, ut aliud docere potuerit Baptista, aliud Christus: quod quo minus admittam, hæc obstant. Joannes et Christus eodem exordio doctrinæ, quam afferebant, summam indicarunt. *Resipiscite: appropinquavit enim regnum celorum*, Matt. iii. 2; iv. 17. Christus ipse regnum cœleste (id est legem novam: nam legem regni nomine appellare Hebræis mos est) dicit cœpisse invadi a diebus Baptistæ, Matt. xi. 12. Joannes dicitur prædicasse baptismum pœnitentiæ in remissionem peccatorum. Marc. i. 4. Tantundem fecisse dicuntur Apostoli Christi nomine, Actor. ii. 38. Exigit Joannes fructus dignos pœnitentia, et iis, qui talem fructum non proferunt, excidium minatur, Matt. iii. 8. et 10. Exigit opera dilectionis supra legem, Luc. iii. 11. Lex dicitur durasse usque ad Joannem, id est, ab illo incepisse doctrina perfectior, Matt. xi. 13. Et principium Evangelii a Joanne ducitur, Marc. i. 1; Luc. i. 77. Ipse Joannes hoc nomine major Prophetis, Matt. xi. 9; Luc. vii. 26. missus scilicet ad dandam cognitionem salutarem populo, Luc. i. 77. ad Evangelium annuntiandum, Luc. iii. 18. Neque usquam Joannes

^t *Pia res est imperium, quamvis ab impio teneatur*] Bene hoc exsequitur ad

hunc locum epistolæ ad Romanos Chrysostomus.

Since the words of the Baptist contain a manifest approval of a military life, many answer, that the exhortations of the Baptist and the precepts of Christ are widely different; so that the one might teach one thing, the other, another. This I cannot admit; for

John and Christ announced their doctrine in the same manner; *Repent, for the kingdom of heaven is at hand*, Matth. iii. 2; iv. 17. Christ says that the kingdom of heaven, (that is the new law, for it is the Hebrew manner to call a law a kingdom,) is taken by force, from the times of John the Baptist, Matth. xi. 12. John is said to have preached the baptism of repentance for the remission of sins: Mark i. 4. The Apostles are said to have done the same in the name of Christ, Acts ii. 38. John requires fruits worthy of repentance, and threatens them with destruction who do not bring forth such, Matth. iii. 8 and 10. He requires works of love beyond the law, Luke iii. 11; *He that hath two coats, &c.* The law is said to have endured until John, that is, a more perfect doctrine began with him, Matth. xi. 13. The beginning of the Gospel narrative is John: Mark i. 1. Luke i. 77. John was on this account greater than the prophets, Matth. xi. 9, Luke vii. 26; being sent to give knowledge of salvation unto the people, Luke i. 77; and to preach the Gospel, Luke iii. 18. Nor does John anywhere distinguish Jesus from himself by

Jesum a se distinguit præceptorum discrepantia (quanquam quæ generalius et confusius, et rudimentorum more a Joanne sunt indicata, eadem diserte tradidit Christus vera lux) sed eo quod Jesus esset promissus ille Messias, Actor. xix. 4; Joan. i. 29. rex scilicet regni cœlestis, qui daturus esset in se confidentibus vim Spiritus Sancti, Matt. iii. 11; Marc. i. 8; Luc. iii. 16.

- IV. 6 Quartum hoc est argumentum, quod mihi ponderis non exigui videtur: Si tollatur jus capitalium suppliciorum, et armis cives tuendi adversus latrones ac prædones, maximam inde secuturum scelerum licentiam et quasi diluvium malorum, "cum nunc quoque constitutis judiciis ægre reprimatur improbitas. Quare si mens Christi fuisset, talem rerum statum, qualis auditus nunquam fuerat, inducere, haud dubie verbis quam maxime disertis ac specialibus edicendum ei fuerat, ne quis de capite judicaret, ne quis arma ferret; quod fecisse nusquam legitur: nam quæ adferuntur, aut valde sunt generalia, aut obscura. Docet autem ipsa æquitas et communis ratio, non tantum verba generalia contrahi, et ambigua commode explicari, sed et a proprietate usuque recepto verborum discedi

■ Cum nunc quoque constitutis judiciis ægre reprimatur improbitas] Διὰ τούτους δικαστήρια καὶ νόμοι καὶ τιμωρίαι καὶ διάφοροι κολάσεων τρόποι.

the difference of their precepts, (though what is indicated in a more general and confused and rudimentary manner by John, Christ, the true light, delivers clearly,) but by Jesus being the Messiah that was to come, Acts xix. 4, John i. 29; that is, the king of the kingdom of heaven, who was to give the Holy Spirit to them that believed on him, Matth. iii. 11. Mark i. 8. Luke iii. 16.

6 (4) In the fourth place there is this argument, which appears to me to have no small weight. If the right of inflicting capital punishments, and of defending the citizens by arms against robbers and plunderers, was taken away, then would follow a vast license of crime and a deluge of evils; since even now, while criminal judgments are administered, violence is hardly repressed. Wherefore if the mind of Christ had been to induce such a state of things as never was heard of, undoubtedly he would have set it forth in the clearest and most special words, and would have commanded that none should pronounce a capital sentence, none should wear arms: which we nowhere read that he did: for what is adduced to this effect is either very general or obscure. Equity and common sense teach us that, in order to avoid that sense of passages which would lead to extreme inconveniences, we may limit the range of general terms, and explain ambiguities, and even depart in some degree from the pro-

nonnihil, ut is sensus evitetur, qui maxima secum incommoda sit allaturus.

7 Quintum sit, quod nullo argumento ostendi potest lex Mosis, quæ ad judicia pertinebat, desiisse priusquam urbs Hierosolyma excinderetur, et cum ea tum species tum spes reipublicæ concideret. Nam neque in lege Mosis ullus terminus isti legi præfinitur, neque Christus aut Apostoli usquam de istius legis cessatione loquuntur, nisi quatenus id comprehensum videri potest in reipublicæ (ut diximus) destructione: imo contra Paulus summum pontificem ait constitutum, ut iudicium ferret secundum legem Mosis, Act. xxiii. 3. Christus ipse in præfatione præceptorum suorum ait, non venisse se ad solvendam legem, sed ad implendam, Matt. v. 17. quod quem de ritualibus sensum habeat non obscurum est; implentur enim lineamenta adumbrantia cum perfecta rei species exhibetur: de legibus autem ad judicia pertinentibus quomodo verum esse potest, si Christus, ut quidam existimant, adventu suo ea sustulit? Si autem mansit obligatio legis, quamdiu stetit Hebræorum respublica, sequitur ut Judæi etiam ad

v.

Propter hos sunt judicia et leges et supplicia, totque pœnarum modi. Chrysostomus in sermone ad Patrem fidelem. [Tom. vi. pag. 696].

priety and received use of words.

7 (5) In the fifth place, it cannot be shewn by any argument that the law of Moses concerning the judgments of tribunals ceased to be in force before the city of Jerusalem was destroyed, and with it, the existence and the hope of the Jewish nation ceased. For there is neither in the law of Moses any term appointed for the force of the law, nor do Christ or his Apostles anywhere speak of the cessation of that law, except in so far as such an event may, as we have said, be comprehended in the destruction of the Jewish state: on the contrary, Paul says that the high priest was appointed to judge persons according to the law, Acts xxiii. 3. Christ himself, in the preface to his precepts says, that he was not come to destroy the law, but to fulfil it, Matth. v. 17. Now in what sense this is to be understood of the Ritual Law, is plain enough; for the lineaments which shadow out an object are fulfilled when the perfect form of the thing is exhibited. But how can this be true of the Judicial Law, if Christ, as some hold, took it away by his coming? But if the obligation of the Law remained as long as the Jewish state continued, it follows that Jews, even though converted to Christianity, if they were summoned before a magistrate, could not refuse, and ought not to judge otherwise than Moses had commanded.

Christum conversi, si ad magistratum vocarentur, eum defugere ⁴ non potuerint, et ut judicare non aliter debuerint quam Moses præscripserat.

8 Ego sane omnia expendens ne levissimam quidem conjecturam reperio, qua motus vir aliquis pius illa tunc Christi loquentis verba audiens, aliter existimare potuerit. Illud agnosco, ante Christi tempus quædam fuisse permissa, sive quoad impunitatem externam, sive etiam quoad animi puritatem (nunc enim ista distinctius exquirere, nec opus, nec otium est) quæ Christus suam disciplinam sectantibus licere noluit, ut ob qualemcumque offensam uxorem dimittere, ab eo qui læserit in judicio exigere ultionem: sed inter Christi præcepta et illas permissiones est diversitas quædam, non est repugnantia. Nam qui uxorem retinet, qui ultionem sibi privatim debitam remittit, nihil facit contra legem; imo hoc facit, quod lex maxime vult. Longe aliud est in iudice, cui lex non permittet, sed imperat ut homicidam morte puniat, reus ipse futurus apud Deum ni fecerit. Huic si Christus interdicat, ne homicidam morte puniat, omnino contrarium legi præcipit, solvit legem.

VI.

9 Sextum sit argumentum ab exemplo Cornelii Cen-

⁴ Scilicet ea de causa, quod morte alias quis tenebatur Magistratum damnandi forent Rei. Neque enim latum omnino suscipere. Vide Notam

8 Weighing the whole case, I do not see the slightest reason for thinking that any pious men, at that time hearing the words of Christ, could think otherwise. I acknowledge that before the time of Christ some things were permitted, either as matters of impunity, or as not destroying purity of mind, (a distinction which we need not dwell upon here,) which Christ did not permit to his followers; as, to put away a wife for every cause, to sue one at law for satisfaction; but between the precepts of Christ and those permissions, there is a diversity, not a repugnance. For he who does not put away his wife, or who remits a satisfaction due to him, does nothing against the law: on the contrary, he conforms to the Law, in the highest degree. But the case of a judge is altogether different; for to him the Law does not permit, but commands him to punish the homicide with death; and he himself is guilty before God if he does not do this. And if Christ forbids him to punish the homicide with death, he commands what is altogether contrary to the Law; he destroys the Law.

9 (6) The sixth argument shall be from the example of Cornelius the Centurion, who both received from Christ the Holy Ghost, the undoubted sign of justification, and was baptized in the name of Christ by the apostle Peter: but we do not read that he gave up the mili-

turionis, qui et Spiritum sanctum, signum indubitatum justificationis, a Christo accepit, et in nomen Christi a Petro Apostolo baptizatus est: militiam autem abdicasse, aut ad eam abdicandam a Petro monitus non legitur. Sunt qui respondeant, cum de religione Christiana a Petro sit institutus, simul censi debere institutum de militia deserenda. Hi, si quidem certum esset atque indubitatum inter Christi præcepta contineri interdictum militiæ, aliquid dicerent. Sed cum id nusquam alibi diserte exstet, certe de ea re aliquid hoc saltem loco, qui id maxime poscebat, dicendum fuerat, ne post ventura ætas officii sui regulas ignoraret. Neque vero solet Lucas, ubi personarum qualitas specialem quandam vitæ mutationem desiderabat, id silentio præterire, ut videre est tum alibi, tum Actor. xix. 19.

10 Septimum huic simile petitur ex eo, quod de Sergio Paulo cœpimus dicere. Nam in ejus conversi historia nullum est indicium ejurati magistratus aut admonitionis factæ ut ejuraretur. Quod autem non narratur, cum narrari, ut diximus, maxime attineat, id nec factum censendum est.

VII.

11 Octavum esse potest, quod ^xPaulus Apostolus, intel-

VIII.

Gallicam in h. l. *J. B.*

^x *Paulus Apostolus, intellectis Juda-*

orum in se insidiis] Utitur hujus loci auctoritate Concilium Africanum: [cap.

tary life, nor was exhorted by Peter to do so.

Some reply that when he was instructed by Peter in the Christian religion, he was also instructed of the unchristian character of his military life. This would be to the purpose, if there were any plain and certain interdiction of a military life in the precepts of Christ. But when there is nowhere such a thing in any clear form, it was plainly necessary that something should have been said on the subject in this place, where it was specially required; in order that the ages to come might not be ignorant of the rules of its duty. And that Luke, when conversion led to any special change in the occupation of the converts, did not omit to state it, we see elsewhere, Acts xix. 19, *Many of them also which used curious arts brought their books, &c.*

10 (7) A seventh argument of a like kind we draw from what is said of Sergius Paulus, as already partly noticed. For in the history of that convert there is no indication of his having abdicated the office of magistrate, or having been admonished to abdicate. Now what is not narrated, when, as we have said, it was highly important that it should be narrated, must be supposed not to have happened.

11 (8) An eighth argument is, that the Apostle Paul, when he was apprized of the Jews lying in wait for him, directed the fact to be

lectis Judæorum in se insidiis, Tribuno indicari eas voluit; et cum Tribunus milites ei addidisset, quorum præsidio in itinere adversus vim omnem tutus esset, nihil contradixit, neque Tribunum aut milites monuit, Deo non placere, ut vis vi repel- latur. Atqui is erat Paulus, qui nullam occasionem edocendi officii aut omitteret ipse, aut omitti ab aliis vellet, 2 Timoth. iv. 2.

- IX. 12 Nonum accedat, quod rei honestæ ac debitæ finis proprius non potest non esse honestus ac debitus. Tributa ut solvamus honestum est, atque etiam præceptum conscientiam obligans, ut Paulus Apostolus explicat: tributorum autem ⁵finis est, ut potestates publicæ habeant unde sumtum faciant ad bonos tuendos, ac coercendos malos, Rom. xiii. 3, 4, 6. Tacitus apposite ad hanc rem: *Neque quies gentium sine armis, neque arma sine stipendiis, neque stipendia sine tributis haberi queunt.* Cui dicto simile est Augustini illud: *Ad hoc tributa præstamus, ut propter necessaria militi stipendium præbeatur.*

Hist. iv. 74.

Contr. Faust. xxii. 74.

98, pag. 253. *Cod. Canon. Eccles. Afric.* 1615]. *Quorum contra furorem possumus non insolita, nec a Scripturis aliena impetrare presidia, quando Apostolus Paulus, sicut in Apostolorum actibus fidelibus notum est, factionum conspirationem militari etiam submovit auxilio.* Utitur et sæpe Augustinus, ut *Epist.* l.

quæ est ad Bonifacium: *epistola* CLIV. ad Publicolam, ubi hæc: *Neque si in illa arma scelerati homines incidissent, Paulus in effusione sanguinis eorum suum crimen agnosceret.* Idem *Epistola* CLIV. Paulus egit, ut sibi tutio etiam armatorum daretur. [*Quæ Epist.* est LXXVII. edit. *Benedictin.* *Epist.* autem l. est

made known to the captain, and when the captain had furnished soldiers, as a guard for him in his journey, he made no opposition, and did not warn the captain or the soldiers that it was displeasing to God to repel force by force. And yet Paul was one who neither omitted nor allowed others to omit any occasion of teaching men their duty, 2 Tim. iv. 2.

12 (9) A ninth argument is, that if a thing be good and right, the end to which it tends cannot be otherwise than good and right. Now to pay taxes is right, and is a thing even binding on the conscience, as the Apostle Paul explains: but the end to which taxes are subservient, [that is, one end among others,] is that the government may be able to maintain forces for the purpose of defending good citizens and restraining bad men, Rom. xiii. 3, 4, 6. Tacitus and Augustine both make this remark. [See the text.]

13 (10) We have a tenth argument from Acts xxv. 11, where Paul says, *If I be an offender, or have committed anything worthy of death, I refuse not to die.* Whence I collect Paul to have been of the opinion, that even after the publication of the Gospel-law, there are some

13 Decimum argumentum præbet locus ille Actor. xxv. 11, ubi Paulus ita loquitur: *Si injuria quemquam affeci, et dignum aliquid morte commisi, non recuso mori.* Unde colligo, ita censuisse Paulum, etiam post publicatam Evangelii legem quædam esse crimina, quæ morte plecti æquitas ferat, aut etiam exigat: quod et Petrus docet, 1 Epist. ii. 19, 20. Quod si ea tum fuisset Dei voluntas, ut capitalibus judiciis abasteretur, potuerat quidem purgare se Paulus, sed non debuerat in hominum animis eam relinquere opinionem, quasi capite plectere nocentes nunc non minus quam olim liceret. Probato autem capitales pœnas post Christi adventum recte exerceri, simul probatum arbitror, bellum aliquod licite geri, puta adversus nocentes multos et armatos: qui ut rei fiant, acie vincendi sunt. Vires enim et resistentia nocentum, sicut in prudenti deliberatione suum habere momentum potest, ita de jure ipso nihil imminuit.

14 Undecimum sit, quod in Apocalypsis prophetia prædi- XI.

CLXXXIV. et Ep. CLIV. est XLVII.]

^b Hic, scilicet, inter alios, quos Auctor minime excludit, ut inepte hoc nomine eum carpunt quidam Interpretes. J. B.

^c Non recuso mori] Sic et Act. xviii. 18: quia nulla in me erat mortis causa. Justinus Apologetico II. κολά-

ζεσθαι δὲ τοὺς οὐκ ἀκολουθοῦν τοῖς διδάγμασιν αὐτοῦ βιοῦντας, λεγομένους δὲ μόνον Χριστιανοὺς, καὶ ὑφ' ὑμῶν, ἀξιοῦμεν. Ut autem puniantur, qui non convenienter præceptis illis vivunt, et nomine solo sunt Christiani, et quidem a vobis, et nos optamus. [pag. 60].

crimes which equity allows, or even requires, to be punished with death; which also Peter teaches, 1 Epist. ii. 19, 20, *If when ye be buffeted for your faults ye shall take it patiently.* If the will of God had then been that there should no longer be capital punishments, Paul might have cleared himself indeed; but he ought not to have left men to think that then, no less than previously, it was lawful to put criminals to death. But when we have proved that capital punishment may lawfully be practised after the coming of Christ, we have also proved, as I conceive, that war may be made lawfully, for example against an armed multitude of evildoers: who must be overcome in battle that they may be dealt with by justice*. For the power and the number of the evildoers, though it may have its weight in prudential deliberation, does not affect the question of what is right.

14 (11) An eleventh argument is, that in the Revelation, wars of

* We may however remark that to treat the army of an enemy as a body of evildoers, is not the true view of war, nor necessary to its justification. War is a relation between two States; and the Right of making war is a necessary Right of a State. See *Elements of Morality*, 775.

cuntur bella quædam piorum cum manifesta approbatione, xviii. 6, et alibi.

XII.

15 Duodecimum esse potest, quod Christi lex solam legem Mosis, qua gentes ab Hebræis separabat, sustulit, Ephes. ii. 14. Quæ autem natura, et bene moratarum gentium consensu honesta censentur, adeo non sustulit, ut sub generali præcepto omnis honesti ac virtutis comprehenderit, (Phil. iv. 8; 1 Cor. xi. 13, 14.) Jam vero criminum poena et arma, quæ injuriam arcent, natura habentur laudabilia, et ad justitiæ, et ad beneficentiæ virtutem referuntur. Atque hic obiter notandus eorum est error, qui Israelitarum jus ad bellum deducunt ex eo solo, quod terram Cananæam illis Deus dedisset. Est enim hæc justa quidem causa, sed non unica. Nam et ante ea tempora pii rationis ductu bella gesserunt: et ipsi Israelitæ postea aliis de causis, ut David ob legatos violatos. Tum vero quæ humano jure quisque possi-

• *Vaticinium Esaiæ*] Id de pace, quæ orbi contigit beneficio Romani imperii, interpretatur Chrysostomus Oratione Christum esse Deum: καὶ ὅτι οὐ παγία ἐστὶ μόνον καὶ ἀκίνητος καὶ ἀβράγης, ἀλλὰ καὶ πολλὴν πρυτανεύσει τῇ οἰκουμένῃ εἰρήνην, καὶ αἱ μὲν κατὰ πόλεις πολυαρχίαι καταλυθήσονται, καὶ αἱ μοναρχίαι, μία δέ τις ἔσται βασιλεία εἰς πάντας ἀρθεῖσα, καὶ τὸ πλὸν αὐτῆς ἐν εἰρήνῃ ἔσται, οὐ καθάπερ ἔμπροσθεν. τὸ μὲν παλαιὸν χειροτέχναι πάντες καὶ ῥήτορες ὅπλα ἐτίθεντο καὶ ἐπὶ παρατάξεως ἐστήκα-

σαν. τοῦ Χριστοῦ δὲ παραγενομένου πάντα ἐκεῖνα διελύθη καὶ εἰς μέρος διωρισμένον τὰ τῶν πολέμων περιέστη. Neque vero predictum tantum est, stabilem fore, immotam, atque inconcussam hanc religionem, sed cum ea adventuram orbi pacem, desituras illis in singulis civitatibus plurium potentias, regnaque ipsa et unum fore super omnes imperium, ac ejus pleraque pacem habitura, contra quam ante fiebat, olim enim et opifices, et oratores induebant arma, consistebant in acie. Post Christi vero adventum cessavit mos iste, et ad definitum homi-

the righteous against the wicked are predicted with manifest approval, xviii. 6, and elsewhere.

15 (12) A twelfth argument may be this: that the law of Christ took away only the law of Moses in so far as it separated the Gentiles from the Jews: Ephes. ii. 14. But such things as are reckoned good by nature and the assent of the most civilized nations, it was so far from taking away, that it comprehends them under the general precept of all virtue, everything of good report, Phil. iv. 8. 1 Cor. xi. 13, 14. Now the punishment of criminals, and defensive war, are held praiseworthy by their nature, and come under the virtues of justice and well-doing.

And hence, in passing, we may note the error of those who deduce the right of the Israelites to make war from the fact alone, that God had given them the land of Canaan. That indeed was a just cause,

det, non minus ejus sunt, quam si Deus donasset: id autem jus per Evangelium non tollitur.

VIII. Videamus nunc etiam quibus argumentis se fulciat adversaria sententia, quo facilius judicet pius aestimator utra præponderent.

1 Primum adferri solet ^{I.} vaticinium Esaiæ, qui futurum dicit, ut populi gladios contendant in ligones, et lanceas in falces; neque gladium sumant alius in alium, neque bellum ultra addiscant, ii. 4. Sed hoc vaticinium aut sub conditione quadam accipiendum est, quemadmodum multa alia; ut nimirum intelligamus talem fore rerum statum, ^{Adv. Gent. l. cap. 6.} si omnes populi Christi legem suscipiant atque impleant; quam ad rem Deus nihil sua ex parte passurus sit desiderari: certum autem est, si omnes sint Christiani, et Christiane vivant, nulla fore bella: quod Arnobius ita enuntiat: *Si omnes omnino, qui homines esse se non specie corporum, sed rationis intelligunt*

num ordinem redacti sunt actus bellici. Habes sensum plane eundem apud Eusebium de *Præparatione*, Lib. i. c. 4.

* Si omnes populi Christi legem suscipiant atque impleant] Nam de Christianis Justinus: οὐ πολεμοῦμεν τοῖς ἐχθροῖς, non pugnamus in hostes. [*Apol. ii. pag. 60 in fin. ed. Sylb. ubi legitur, τοὺς ἐχθροῦς*]. Plane ut de Essenis Philo in oratione Omnem bonum esse liberum: (pag. 877, A.) βελῶν, ἢ ἀκόντων, ἢ ξιφιδίων, κράνους, ἢ θώρακος, ἢ δσπίδος οὐδένα παρ' αὐτοῖς ἀν εὐροῖς δημιουργὸν ἢ ὀπλοποιόν, ἢ μηχανοποιόν.

Nullum inter eos reperias, qui aut jacula aut sagittas aut gladium aut galeam aut loriceam aut scutum fabricet, nullum qui aut arma conficiat, aut machinas. Simile est quod Chrysostomus ait 1 ad Corinth. xiii. 8: *Si esset inter homines qualis oportet dilectio, nullas fore penas capitales*. [Οὐτε γὰρ νόμων, οὔτε δικαστηρίων ἴδει, οὐ κολάσεων, οὐ τιμαριῶν, οὐκ ἄλλον τῶν τοιοῦτων οὐδενός. εἰ γὰρ πάντες ἡγάπων, καὶ ἡγαπῶντο, οὐδὲν ἂν ἡδίκησεν οὐδεὶς, etc. Tom. III. pag. 454].

but not the only cause. For before that time pious men, acting by the light of reason, had made war; and the Israelites themselves did so for other causes, as David, for the insult done to his ambassadors. For the possessions which any one has by human right are his no less than if God had given him them: and this right is not taken away by the Gospel.

VIII. Let us now see what arguments are offered in support of the opposite opinion, that the pious reader, judging fairly, may see which side præponderates.

1 (1) First, it is usual to adduce the prophecy of Isaiah, ii. 4; that the people shall beat their swords into plowshares, and their spears into pruning-hooks; that nation shall not lift up sword against nation, neither shall they learn war any more. But either this prophecy is to be received conditionally, like many others;—namely, that we are

potestate, salutaribus ejus pacificisque decretis aurem vellent commodare paulisper, et non fastu et supercilio tumidi suis potius sensibus quam illius commonitionibus crederent, universus jamdudum orbis mitiora in opera conversus usibus ferri, tranquillitate in mollissima degeret, et in concordiam salutarem incorruptis fœderum sanctionibus conveniret.

*Inst. Div. i.
18. n. 16.*

Lactantius vero hoc modo : *Quid fiet, si omnes in concordiam consenserint? quod certe fieri poterit, si pernicioso et impio furore projecto innocentes ac justī esse velint? Aut intelligendum est pure; quō modo si accipiat, docet res ipsa impletum hoc nondum esse, sed implementum ejus, ut et conversionis generalis Judæorum, adhuc exspectandum. Utrovis autem modo sumas, nihil hinc inferri potest adversus bellorum justitiam, quamdiu sunt qui pacis amantes pace frui non sinunt, sed vim eis intentant.*

2 Ex quinto Matthæi capite plura argumenta depromi solent, ad quorum dijudicationem opus est animo repeti, quod paulo ante diximus: si Christo id fuisset propositum, omnia capitalia judicia, et jus bellorum tollere, facturum id fuisse

^b *Quod Græci vertunt τῷ δίκουντι]* Ut et Lucas in Stephani oratione: ὁ δίκων τὸν πλεόντων. (Act. vii. 27).

^c Confer hęc Auctoris *Epist.* 1057. 1. Part. J. B.

^d *Dimitte illi etiam pallium]* Id ita

exponit Cyprianus de bono Patientiæ: *Ut tua ablata non repetas.* (pag. 216). Irenæus, Lib. iv. cap. xxvii: (xiii.) *Tolenti tibi tunicam, remitte ei et pallium: sed non quasi nolentes fraudari contristemur, sed quasi volentes donaverimus,*

to understand that this would be the state of things, if all nations should receive and fulfil the law of Christ; to which end God declares that nothing is wanting on his part. For it is certain that if all be Christians, and live as Christians, there will be no wars: as Arnobius and Lactantius remark. [See the text.]

Or it may be understood absolutely; in which case the facts shew that it is not yet fulfilled, and that its fulfilment, like the conversion of the Jews, is still to be looked for. But in whichever way you take it, nothing can be inferred from it against the justice of wars; so long as there are persons who do not allow the lovers of peace to live in peace, but use force against them.

2 From the fifth chapter of Matthew, many arguments are usually drawn; and in order to estimate the value of these, we must repeat what has been said already; That if the intention of Christ had been to take away all capital punishment, and the right of making war, he would have done this in the most express and special words, in consideration of the magnitude and novelty of the thing: and all the

verbis quam maxime expressis ac specialibus, ob rei magnitudinem ac novitatem; eoque magis, quod nemo Judæus aliter cogitare poterat, quam leges Mosis ad judicia et rempublicam pertinentes vim suam in homines Judæos habere debere, quamdiu staret illa respublica. Hac ergo de re præmoniti locorum singulorum vim ordine exploremus.

3 Adversariæ ergo sententiæ munimentum secundum ex istis verbis petitur: *Audistis dictum fuisse, Oculum pro oculo, et dentem pro dente. Ego vero dico vobis, ne obstitite injurioso*, (עַשְׂרָה) ^b quod Græci vertunt τῷ ἀδικούντι, Exod. xi. 13.) *sed cædenti te in dexteram maxillam, alteram quoque obverte.* Hinc enim inferunt quidam, nullam injuriam aut repellendam, aut vindicandam, sive publice, sive privatim. ^cAtqui non hoc dicunt verba: neque enim magistratus hic alloquitur Christus, sed eos, qui impetuntur; nec de quavis agit injuria, sed de tali, qualis est alapa: sequentia enim verba restringunt præcedentium generalitatem.

4 Sic in præcepto sequente: *Qui velit tecum litigare, ut tunicam accipiat, ^cdimitte illi etiam pallium*: non omnis

gaudeamus. *Et si quis te, inquit, angariaverit mille passus, vade cum eo alia duo, ut non quasi servus sequareis, sed quasi liber præcedas.* Etiam Libanius, qui Evangelia legerat, laudat non litigantes de chlamyde et tunica, in

oratione de custodia reorum. Hieronymus dialogo i. adversus Pelagium: *Docet Evangelium ei, qui nobiscum velit judicio contendere, et per lites et jurgia auferre tunicam, etiam pallium esse concedendum.* (Tom. ii. pag. 274 o).

more on that account, that no Jew could think otherwise than that the laws of Moses which concerned the Jewish State and tribunals were to retain their authority over Jews, as long as the State existed. With this previous remark, let us consider in order the force of the particular passages.

3 (2) The second argument then in favour of the opposite opinion is taken from these words: *Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: but I say unto you, that ye resist not the evil man: but whosoever shall smite thee on thy right cheek, turn to him the other also.* Hence some infer that no injury is to be resisted or satisfaction for it to be required, either publicly or privately. But this is not what the words say: for Christ is not here addressing magistrates, but those who are assailed: nor does he speak of wrongs of all kinds, but of such as a blow on the cheek; for the subsequent words restrict the generality of the preceding.

4 So in the following precept, *If any man will sue thee at law, and take away thy coat, let him have thy cloke also*: it is not every appeal

II.

provocatio ad judicem aut arbitrum prohibetur, Paulo interprete, qui lites non omnes prohibet, 1 Cor. vi. 4. sed vetat Christianos in prophanis auditoriis inter se litigare, idque ad Judæorum exemplum, apud quos recepta erat sententia, *Qui adducit negotia Israelitica ad extraneos, polluit nomen Dei*: sed vult Christus ad exercendam patientiam nostram, de rebus, quæ facile sunt recuperabiles, ut tunica, aut cum tunica, si opus sit, pallium, non contendendi judicio, sed quamvis optimo jure nitamur, omitti juris persecutionem. Apollonius Tyanæus negabat, philosophi esse *περὶ χρησίου διαφέρεισθαι*, de pecuniola litigare. *Non improbat prætor* (inquit Ulpianus) *factum ejus qui tanti habuit re carere, ne propter eam sæpius litigaret. Hæc enim verecunda cogitatio ejus, qui lites exsecratur, non est vituperanda.* Quod hic probari a probis ait Ulpianus, hoc Christus imperat, ex rebus honestissimis et probatissimis deligens præceptorum suorum materiam. At non hinc recte colligas etiam parenti, etiam tutori nefas fore, id sine quo liberi, sine quo pupilli sustentari nequeant, si cogatur, apud judicem defendere. Aliud enim

Philostr. xi.
16.

L. Item et. 4.
§ 1. D. de
alien. jud.
mut. causa
facta.

^d *Ut et patientia, et benignitas omnibus innotescat*] Justinus Apologetico 11: *περὶ δὲ τοῦ ἀνεξικακούς εἶναι καὶ ὑπερηκόδους πᾶσι καὶ δορυγίτους, ἃ ἔφη ταῦτά ἐστι.* *Quæ dixit, huc pertinent, ut adversus omnes simus patientes, offi-*

ciosi, minime iracundi. (pag. 49).

^e *Petenti abs te dato*] Justinus Apologetico eodem: *εἰς δὲ τὸ κοινωνεῖν τοῖς δεομένοις καὶ μὴδὲν πρὸς δόξαν ποιεῖν, ταῦτα ἔφη· παντὶ τῷ αὐτοῦν τι δίδοτε, &c.* (pag. 48). *De commu-*

to a judge or an umpire which is forbidden, according to the interpretation of Paul, who does not forbid men having matters at law, 1 Cor. vi. 4: only he forbids the Christians to go to law before the heathen tribunals: and this he does by the example of the Jews, among whom this maxim was current; He who refers the concerns of the Israelites to the judgment of strangers, pollutes the name of God: but Christ, in order to exercise our patience, directs us that with regard to matters which may easily be replaced, as our coat, or if need be, our cloak along with our coat, we should not contend at law; but though our right be indisputable, abstain from prosecuting it judicially. Apollonius Tyanæus said that a philosopher ought not to quarrel about paltry pelf. Ulpian says, *The prætor does not disapprove the act of him who thought it a good thing to have nothing, that he might have nothing to go to law about.* For this temperate notion of those who hate lawsuits is not to be condemned. What Ulpian here says is approved by good men, is what Christ makes his command, choosing the matter of his precepts from the most approved and becoming examples. But you cannot infer from this that even a parent or a guardian is not to

est tunica et pallium, aliud totum illud unde vivitur. In Clementis Constitutionibus de homine Christiano dicitur, si litem habeat, σπονδαζέτω διαλύεσθαι, κἄν δὲν βλαφθῆναι τι, *det operam, ut transigat, etiamsi quid damni accipiendum sit.* Quod ergo de moralibus dici solet, hic quoque locum habet, non consistere hæc in puncto, sed habere suam quandam latitudinem. Lib. I. 45.

5 Sic in eo, quod deinceps sequitur, *Qui angariabit te ad milliare unum, abi cum eo duo*: non dixit Dominus de centum milliaribus, quod iter hominem a suis negotiis longius abduceret, sed de uno, et, si ita usu veniat, de duobus; quæ deambulatio quasi pro nihilo ducitur. Sensus ergo est, in his, quæ nobis non multum sunt incommodatura, non urgendum nobis esse jus nostrum, sed cedendum plus etiam quam alter postulet, ^dut et patientia, et benignitas nostra omnibus innotescat.

6 Sequitur porro: *⁹Petenti abs te dato, et volentem a te mutuo sumere, ne rejice.* Si in infinitum hoc producas, nihil durius. Qui domesticorum curam non agit, infideli est

nicandis vero facultatibus nostris cum egentibus, et ne quid ad gloriam aucupandam faciamus, hæc dixit: omni petenti date, etc. Aliibi: παρὶ δεομένῳ κοινωνοῦντες, communicantes nostra om-

ni egenti. (pag. 47). Cyprianus Testimoniorum, Lib. III. i. Nemini negandam eleemosynam; item illic: omni poscenti te dato, et ab eo, qui voluerit mutuari, ne adversatus fueris.

defend before the judge, if he be compelled, the means of subsistence of a child or a ward. A coat and a cloke are one thing, but the necessary means of subsistence another. In the Clementine Constitutions it is said of a Christian, *If he have a lawsuit, let him try to bring it to an end, even if he have thereby to suffer loss.* What is commonly said of moral rules applies here also, that right dealing does not lie in a point, but has a certain appropriate latitude.

5 So in what follows, *Whosoever will impose service as for one mile, go with him two*: our Lord does not speak of a hundred miles, a distance that would carry a man quite away from his business, but of one, and if need be, two; which is a trifling amount of walking. The meaning then is this; That in matters which are not very inconvenient to us, we are not to insist upon our right, but to give up even more than is asked, that our patience and kindness may appear to all.

6 It is added, *Give to him that asketh thee, and from him that would borrow of thee turn not thou away.* If you carry this to an indefinite extent, nothing can be more harsh. He who does not care for his own is worse than an infidel, says St Paul, 1 Tim. v. 8. Let us then follow

deterior, inquit Paulus, 1 Tim. v. 8. Sequamur ergo eundem Paulum, optimum legis herilis interpretem, qui Corinthios excitans ad beneficentiam in Hierosolymitanos exercendam, *Non, inquit, ut aliis sit laxamentum, vobis res angustæ, sed ut æquabiliter vestra copia succurrat illorum inopia*, 2 Cor. viii. 13. Id est (Livii verba in re non dissimili usurpabo) ut ex eo, quod adfluit opibus vestris, sustineatis necessitates aliorum: qui sensus est et in Cyro Xenophontis: ἂν ἴδω περισσὰ ὄντα τῶν ἐμοὶ ἀρκούντων, τοῦτοις τὰς ἐνδείας τῶν φίλων ἐξακοῦμαι. Similem æquitatem adhibeamus interpretando præcepto, quod jam a nobis recitatum est.

7 Lex Hebræa sicut divortii libertatem indulgebat, ut sævitæ maritorum in uxores occurreret: ita etiam privatæ ultioni, ad quam gens illa valde prona erat, coercendæ, jus læso fecerat ab eo qui læserat, non manu sua, sed apud judicem exigere talionem: quod lex etiam xii. tabularum secuta est; *Si membrum rupit, talio esto*. Christus vero majoris patientiæ magister tantum abest, ut illam in jam læso probet vindictæ flagitationem, injurias quasdam ne arceri quidem vult, aut vi, aut judicio. At quales injurias? tolerabiles scilicet, non quod non in atrocioribus quoque laudabile hoc sit, sed quod restrictiore quadam patientia contentus sit. Ideo exem-

¹ *Vestra copia succurrat illorum inopiæ*] Seneca de beneficiis secundo: *Dabo egenti, sed ut ipse non egeam*. (Cap. 15). Chrysostomus in locum ad Corinthios hic productum: ὁ Θεὸς τὰ κατὰ δύναμιν ἀπαιτεῖ, καὶ καθ' ὃ ἔχει

τις, οὐ καθ' ὃ οὐκ ἔχει. *Deus pro facultate poscit, quatenus habet quis, non quatenus non habet*. Quod ut recte intelligatur, accedant sequentia: ἐπαινεῖ μὲν τοὺς ὑπὲρ δύναμιν, οὐκ ἀναγκάζει δὲ τούτους ποιῆσαι ταῦτό. *Laudat*

Paul, the best interpreter of his master's law, who, when exciting the Corinthians to beneficence towards those of Jerusalem, says, 2 Cor. viii. 13, *Not that other men may be eased and ye burdened, but that your abundance may be a supply for their want*. The like expressions are used by heathen authors, as Livy, Xenophon. [See the text.]

7 As the Hebrew law allowed a liberty of divorce, to moderate the harshness of men towards their wives; so to restrain private revenge to which the nation was very prone, the law allowed the injured man to require from the injurer compensation or satisfaction, not with his own hand, but before the judge. This was followed in the law of the Twelve Tables, which authorized retaliation. But Christ, a teacher of a better patience, is so far from approving the injured man who demands such satisfaction, that he will have some injuries not even

plum posuit in alapa, quæ non vitam impetit, non corpus mutilat, sed tantum contemptum quendam nostri significat, qui nos nihilo deteriores facit. Seneca, libro de constantia sapientis, injuriam a contumelia dividit: *Prior illa, inquit, natura gravior est: hæc levior et tantum delicatis gravis, qua non læduntur, sed offenduntur. Tanta est animorum dissolutio et vanitas, ut quidam nihil acerbius putent. Sic invenias servum, qui flagellis quam colaphis cædi malit.* Idem alio loco: *Contumelia est minor injuria, quam queri magis quam exsequi possumus, quam leges quoque nulla dignam vindicta putaverunt.* Sic apud Pacuvium quidam: *Patior facile injuriam, si est vacua a contumelia.* Et apud Cæcilium alius:

Facile ærumnam ferre possim, si inde abest injuria;

Etiamque injuriam, nisi contra constat contumelia;

Demosthenes: *οὐδὲ γὰρ τὸ τύπτεσθαι τοῖς ἐλευθέρους δεινόν, καίπερ ὃν δεινόν, ἀλλὰ τὸ ἐφ' ὕβρει.* Nec enim tam grave hominibus ingenuis verberari, quamquam et hoc grave, quam per contumeliam verberari. Is quem dixi Seneca paulo inferius ex contumelia dolorem, affectum esse ait, quem humilitas animi moveat contrahentis se ob factum dictumve inhonorificum.

8 In tali ergo circumstantia patientiam Christus præcipit:

quidem quod facultates exsuperat, (nempe in Thessalonicensibus) sed hoc (Achæos scilicet) non cogit idem facere. [Tom. III. p. 641].

Non quod non in atrocioribus quoque laudabile hoc sit] Vide Chrysosto-

mum dicto jam loco.

* Locus est in Oratione *Adversus Midiam*, pag. 395. v. Refertur et fusiuss, a Saturnino, Lib. 16. § 6. v. *De Panis*. J. B.

repelled either by force or judicially. But what injuries? Such as are tolerable: not that the same course of action may not be laudable in more atrocious attacks: but because he contents himself with a patience within certain limits. And thus he takes as his example a blow on the cheek, which does not endanger the life or maim the body, but only expresses a contempt which does us no harm.

In like manner Seneca, Pacuvius, Cæcilius, Demosthenes, distinguish between contumely and injury. [See the text.] And Seneca says that the pain of contumely is the feeling of the humiliated mind recoiling from an act or deed which assails our honour.

8 In such circumstances Christ commands patience: and that he may not be met by the common objection that *By bearing one injury you incite another*, he adds, that we are rather to bear a second injury

et ne quis tritum illud objiciat, ⁹ *Veterem ferendo injuriam invitas novam*: addit, ⁸ potius etiam ferendam esse alteram injuriam, quam propulsandam priorem: quia scilicet ^h nihil inde ad nos mali pervenit, nisi quod in stulta persuasione positum est. Maxillam obvertere in Hebraismo est patienter ferre, ut apparet Esai. l. 6; Jerem. iii. 3: ¹ *præbere os contumeliis*, dixit Tacitus Historiarum tertio¹.

III.

9 Tertium argumentum peti solet ex eo, quod apud Matthæum sequitur: *Audistis dictum fuisse, Diliges proximum tuum, et odio habebis inimicum tuum: Ego vero dico vobis, Diligite inimicos vestros, benedicite eis, qui vos exsecrantur, precamini pro eis, qui infesti vobis sunt et vos persequuntur.* Sunt enim qui existimant cum tali dilectione et beneficentia adversum inimicos et infestos pugnare tum judicia capitalia, tum bella. Sed facile id refellitur, si ipsum illud legis Hebraicæ dictum consideremus. Præcipiebatur Hebræis, ut

⁹ E. Publio Syro, referente AULO GELLIO, Noct. Attic. xvii. 14. J. B.

⁸ Potius ferendam esse alteram injuriam] Chrysostomus vii. ad Romanos: αὐτὴ γὰρ ἡ λαμπρὰ νίκη, τὸ πλεῖον αὐτῷ παρασχεῖν ὧν βούλεται, καὶ τοὺς ἔρους τῆς πονηρίας ἐπιθυμίας αὐτοῦ τῇ δαψιλείᾳ τῆς οικίας ὑπερβῆναι μακροβυλίᾳς. Hæc egregia victoria plus illi largiri quam velit, et fines improba in illo libidinis liberalitate propria patientia transcendere. [Tom. iii. pag. 98].

^h Nihil inde ad nos mali pervenit, nisi quod in stulta persuasione positum est] Chrysostomus de Statuis prima: [Immo secunda. pag. 471. Tom. vi.] ὕβρις οὐκ ἀπὸ γνώμης τῶν ὑβριζόντων, ἀλλ' ἀπὸ τῆς διαθέσεως τῶν πασχόντων ἢ συνίσταται, ἢ ἀπὸλλυται. Contumeliæ non ab inferentis animo; sed ex judicio eorum, qui patiuntur, aut fit, aut perit.

¹ Præbere os contumeliis] Præbere os, eo sensu et apud Terentium est

than to repel the first; since we thereby receive no evil except what has its seat in a foolish persuasion.

To give the cheek to the smiter, is a Hebraism implying to bear patiently, as appears, Isaiah l. 6, Jerem. iii. 3. Tacitus uses a similar expression.

9 (3) A third argument is usually drawn from that which follows in St Matthew, *Ye have heard that it hath been said, Thou shalt love thy neighbour, and hate thine enemy; But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them that despitefully use you, and persecute you.* There are who think that such love to enemies and assailants is inconsistent both with capital punishments and with war.

But this is easily refuted if we consider this precept of the Hebrew law more nearly. The Hebrews were commanded to love their neighbour, that is, the Hebrew; for so the word *neighbour* is there taken, as we see, Levit. xix. 17, *Thou shalt not hate thy brother in thy heart:*

proximum diligenter, ²Hebræum scilicet: ita enim vocem proximi ibi sumi ostendit Levit. xix. comma 17, collatum cum commate 18. At non eo minus imperatum erat magistratibus occidere homicidas, et alios graviter sotes: non eo minus tribus undecim ob delictum atrox justo bello persecutæ sunt tribum Benjamiticam, Jud. xx. non eo minus recte David, qui prælia Domini præliabatur, regnum sibi promissum ab Isboseto armis repetit.

10 Sit ergo nunc porrecta latius proximi significatio ad homines quosvis: omnes enim in communem gratiam sunt recepti: nulli populi a Deo devoti: licebit tamen in omnes quod tunc in Israelitas licuit, qui diligere æque tunc jubebantur, ut nunc quivis homines. Quod si etiam velis in Evangelica lege majorem dilectionis gradum imperari, consedatur et hoc, dum illud quoque constet, ^knon omnes æqualiter diligendos, sed magis patrem, quam extraneum. Sic etiam bonum innocentis

Adelphis. (Act. II. Sc. II. vers. 7).

¹ Apud Auctorem illum est: Mox ut præberi ora contumeliis. Cap. 31. Et os offerre contumeliis. Cap. 35. num. 6. Lib. III. Hist. indicati. Sic et Livius dixit: *Desisse postremo præbere ad contumeliam os.* Lib. IV. cap. 35, num. 10. quæ jam animadverto partim observata a Clar. Clerico, in Matth. v. 39. Adde CICEBON. I. *Ep. ad Attic.* 18. pag. 145. *Orat. pro S. Rosc. Amer.* cap. 49, pag. 205. et in Verr. III. 16,

pag. 32. J. B.

² *Hebræum scilicet*] Cui par prolytus: leges autem de non nocendo etiam ad incolas illos incircumcisos, de quibus actum cap. 1, § xvi. porrigebantur. Ita Thalmudici.

^k *Non omnes æqualiter diligendos*] Tertullianus *adversus Marcionem* IV: (Cap. 16). *Secundus gradus bonitatis est in extraneos: in proximos primus.* Hieronymus *adversus Pelagium*, dialogo 1: *Præceptum est mihi, ut diligam in-*

thou shalt in anywise rebuke thy neighbour; compared with verse 18, Thou shalt not avenge nor bear any grudge against the children of thy people, but thou shalt love thy neighbour as thyself. But notwithstanding this, the magistrate was commanded to put to death the manslayer and other great criminals: notwithstanding this, the eleven tribes justly made war upon the tribe of Benjamin for a heinous crime, Judg. xx.: notwithstanding this, David who fought the battles of the Lord, rightly won by arms from Ishbosheth the kingdom promised to him. [2 Sam. iii. 1.]

10 Let it be granted then that the word *neighbour* is now to be extended more widely so as to include all men: for all nations are now received under one common rule of grace; no people is cut off from God; still there will be the same permission for all nations which there then was for the Israelites, who were then commanded mutual love, as all men now are.

But if you allege that a greater degree of love is enjoined in the

bono nocentis, bonum commune privato antehabendum ordinatæ dilectionis lege. Ex dilectione autem innocentium nata sunt et judicia capitalia, et pia bella. Vide sententiam moralem, quæ extat Prov. xxiv. 11. Debent ergo Christi præcepta de singulis diligendis atque adjuvandis ita impleri, nisi major ac justior dilectio impediatur. Notum est dictum vetus: ¹ *Tam omnibus parcere crudelitas est, quam nulli.*

11 Adde, quod inimicos diligere jubetur Dei exemplo, qui malis solem suum oriri facit. At idem Deus de quibusdam malis et in hac vita poenas sumit, et olim sumet gravissimas. Quo argumento simul solvuntur ea, quæ de lenitate Christianis præcepta ad hanc rem adferri solent. Nam Deus lenis, misericors, longanimis appellatur Jonæ iv. 2; Exod. xxxiv. 6. At ² ejusdem in contumaces iram, hoc est, puniendi voluntatem,

micos, et orem pro persecutoribus. Numquid justum est ut ita diligam, quasi proximos et consanguineos, ut inter æmulum et necessarium nulla distinctio sit? (Tom. II. pag. 274. c).

¹ *Tam omnibus parcere crudelitas est, quam nulli*] Verba sunt Senecæ I. de Clementia, cap. 11. Chrysostomus I. ad Cor. iii. 12, et sequentibus, de poenis humanis agens: οὐδὲ ἀνθρώποι ἐμότητι ταῦτα πράττουσιν, ἀλλὰ φιλανθρωπία: non ex sævitia, sed ex bonitate ita faciunt omnes. (Tom. III. pag. 297). Augustinus: (ep. LIV. ad Mace-

donium). Sicut est aliquando misericordia puniens, ita et crudelitas parcens. Imperatores, Valentinianus, Theodosius, et Arcadius, in lege Tertia, Codice Theodosiano, de defensoribus civitatum: Removeantur patrocinia, quæ favorem reis et auxilium scelerosis impertiendo maturari scelera fecerunt. Totilas apud Procopium Gothicorum II: [immo Lib. III. cap. 8]. τὸ τε ἐξαμαρτάνειν καὶ τὸ διακωλύειν τὴν εἰς τοὺς ἡμαρτηκότας τιμωρίαν, οἶμαι, ἐν ἴσῳ ἐστίν. Peccare et prohibere poenas peccantium in pari pono. Vide quæ dicen-

Gospel-law, this also may be conceded, provided we make this reserve, that all are not to be loved equally, but, for example, a father more than a stranger: and thus, the good of the innocent is to be preferred to the good of the guilty, public good to private good. Now capital punishments and just wars arise from our love of the innocent. See Prov. xxiv. 11, *If thou forbear to deliver them that are drawn unto death, and those that are ready to be slain, &c.* And thus the precepts of Christ respecting loving and helping all are to be fulfilled in such a way that a greater and juster love do not interfere. There is a noted ancient saying, *It is as great a cruelty to be indulgent to all as to none.*

11 Add that we are commanded to love our enemies by the example of God, who makes his sun to rise on the unjust. Yet the same God punishes some evil deeds in this life, and will hereafter punish them in the heaviest manner. And the same argument solves what is said on this subject about the injunction to Christians to be merciful. For God

passim describunt sacræ literæ, Num. xiv. 18; Rom. ii. 8. Et hujus iræ minister constitutus est Magistratus, Rom. xiii. 4. Moses ab eximia lenitate prædicatur: at idem pœnas de sontibus exegit, etiam capitales. Christi lenitatem et patientiam imitari passim jubemur. At ^mChristus est qui et Judæos inobedientes suppliciis affectis gravissimis, Matt. xxii. 7. et impios in die judicii pro meritis est damnaturus. Magistri lenitatem imitati sunt Apostoli, qui tamen ⁿpotestate sibi divinitus data usi sunt ad pœnam facinorosorum, 1 Cor. iv. 21; v. 5; 1 Tim. i. 20.

12 Quartus locus qui objicitur est Rom. xii. 17. *Nemini malum pro malo reddite: procurate honesta in omnium conspectu: si fieri potest, quantum in vobis est, cum omnibus hominibus in pace viventes, non vosmetipsos ^oulciscentes,* IV.

tur Lib. 11, cap. xxi. § 2.

ⁿ *Ejusdem in contumaces iram.]* Vide hæc de re Cyrillum libro v. contra Julianum. (Pag. 173, seqq.)

^m *Christus est qui Judæos inobedientes suppliciis affectis gravissimis]* Adde loca Matth. xxi. 41; Lucæ xix. 12, 14, 27. Chrysostomus ad Rom. xiv. narratis malis Hierosolymorum: (Tom. III. pag. 205). *ὅτι δὲ Χριστὸς αὐτοὺς ταῦτα εἰργάσατο, ἀκούσων αὐτοῦ τοῦτο προλέγοντος καὶ διὰ παραβολῶν, καὶ σαφῶς, καὶ διαρρήδην. Christum esse qui hæc fecerit, audi ipsum prædicentem, tum per*

parabolas, tum aperte et exerte. Similia habet oratione secunda adversus Judæos.

ⁿ *Potestate sibi divinitus data usi sunt]* Chrysostomus 1 Cor. iv. 21. *δυνάμει, κηρύσσω; ἵστι γὰρ πνεῦμα πράότητος καὶ πνεῦμα ἀστηρότητος. Interficiam, mutilabo? est enim ut lenitatis ita et severitatis spiritus.* [Tom. III. pag. 321.] Vide et Augustinum de sermonibus Domini in monte, lib. 1, et alios, quos citat Gratianus Caus. xxiii. quest. viii.

^o *Ulciscentes]* Vulgata interpretatio in hoc loco habet *defendentes*. Sed ea

is called merciful, gracious, longsuffering, Jonah iv. 2, Exod. xxxiv. 6; and yet Scripture everywhere speaks of his wrath, that is, of his intention to punish, in reference to the rebellious, Num. xiv. 18, Rom. ii. 8. And of this wrath, the magistrate is constituted minister, Rom. xiii. 4. Moses is praised for his extreme gentleness; yet Moses inflicted punishment, even capital punishment, on the guilty. We are everywhere commanded to imitate the gentleness and patience of Christ. Yet Christ it was who inflicted the most severe punishment on the disobedient Jews; Matth. xxiii. 7. [In the parable, *He destroyed those murderers, and burnt up their city.*] The Apostles imitated the gentleness of their master; and yet they used their divinely-given power for the punishment of evil-doers: 1 Cor. iv. 21, *Shall I come unto you with a rod?* v. 5, *To deliver such a one unto Satan for the destruction of the flesh;* 1 Tim. i. 20, *Whom I have delivered unto Satan.*

12 (4) The fourth passage which is objected is Rom. xii. 17, *Recompense no man evil for evil, &c.* But here too the same answer as

dilecti, sed date locum iræ: scriptum est enim; Meum est ulcisci: ego rependam, dicit Dominus. Itaque si esurit inimicus tuus, ciba eum; si sitit, da ei potum: hoc enim si feceris, carbones ignis coacervabis in caput ejus. Ne victor a malo, sed vince bono malum. Sed hic quoque eadem, quæ ad locum superiorem patet responsio. Nam quo tempore dictum fuerat a Deo, Meum est ulcisci, ego rependam; eo ipso tempore et judicia capitalia exercebantur, et de bellis scriptæ erant leges. Quin et beneficia inimicis (popularibus scilicet) exhiberi jubentur, Exod. xxiii. 4, 5. Hæc tamen, ut diximus, neque pœnis capitalibus, neque bellis justis in ipsos etiam Israelitas obstabant. Quare ne nunc quidem verba eadem, aut præcepta similia, quamvis latius patentia, in talem sensum rapienda sunt: eoque minus quia capitum sectiones non ab Apostolis sunt, aut eorum ætate, sed multo serius factæ ad dividendam lectionem et faciliorem locorum allegationem. Quare quod nunc xiii. caput inchoat, *Omnis*

vox sæpe a Christianis in ulciscendi sensu posita invenitur. Tertullianus de *Patientia*: (Cap. x.) *Jam si levius defendaris, insanies: si uberius, oneraberis. Quid mihi cum ultione, cujus modum regere non possum per impatientiam doloris?* Adversus Marcionem, ii.: *non enim injuriæ mutuo exercendæ licentiam sapit, sed in totum cohibendæ violentia prospici, ut quia durissimo et infideli in Deum populo longum vel*

etiam incredibile videretur a Deo expectare defensam, edicendam postea per Prophetam, Mihi defensam, et ego defendam, dicit Dominus: interim commissio injuriæ metu vicis statim occurrente repastinaretur: et licentia retributionis prohibitio esset provocationis; ut sic improbitas astuta cessaret, dum secunda permissa, prima terretur; et prima deterrita, nec secunda committitur, quæ et alias facilius timor talionis per

above is evidently applicable. For at the very time at which God said, [as here quoted by St Paul,] *Vengeance is mine, I will repay*, [Deut. xxxii. 35] capital punishments were practised and laws concerning war were given. So again they are commanded to do good to their enemies, Exod. xxiii. 5: *If thou meet thine enemy's ox or his ass going astray, &c.* (that is, among their fellow-citizens;) and yet this did not prevent, as we have said, either capital punishments, or wars among the Israelites themselves. And therefore the same words, or similar precepts, though at present having a wider application, are not now to be wrested to such a sense. And this the less, because the division of chapters, as we now have it, was not made by the Apostles, nor in their age, but much later for convenience of reading and reference: and therefore what now begins chapter xiii. *Let every soul be subject to the higher powers*, and what follows, must be taken in connexion with the precepts against recompensing evil for evil.

anima potestatibus supereminentibus subjecta esto, et quæ sequuntur, cum illis de ultione non expetenda præceptis cohæsit.

13 In hac autem dissertatione dicit Paulus, potestates publicas Dei ministras esse, et vindices ad iram (id est ad pœnam) in maleficos: eo ipso apertissime distinguens inter ultionem publici boni causa, quæ Dei vice exigitur, et ad ultionem Deo reservatam referenda est; et illam explendi doloris, quam paulo ante interdixerat. Nam si ultionem etiam illam, quæ boni publici causa exigitur, in illo interdicto comprehensam velis, quid erat absurdius, quam cum dixisset abstinendum a pœnis capitalibus, deinde subdicere, in hoc potestates publicas a Deo constitutas, ut pœnas vice Dei exigant?

14 Quintus quo nonnulli utuntur locus est 2 Cor. x. 3. *Quoniam in carne ambulantes, nequaquam carnis bella gerimus. Nam arma militiæ nostræ non sunt carnalia,*

V.

eundem saporem passionis. Nihil amarior quam id ipsum pati, quod feceris alius. (Cap. 18). De Monogamia: Alitè diluvium iniquitates provocaverunt, semel defensæ qualescumque fuerunt, non tamen septuagies septies, quod duo matrimonia meruerunt. (Cap. 4). Locum Pauli, de quo hic sermo, non male explicat Augustinus epistola CLIV: Hinc autem dictum est, non resistamus malo, ne nos vindicta delectet, quæ alieno malo

animum pascit. Vide quæ infra Lib. II. cap. xx. § v. et x.

¶ *Non sunt carnalia*] Chrysostomus hoc loco: ὅπλα σαρκικά intelligit πλοῦτον, δόξαν, δυναστείαν, εὐγλωττίαν, δεινότητά, περιδρομάς, κολακείας, ὑποκρίσεις. *Opes, gloriam, potentatum, eloquentiam, solertiam, prensationes, assentationes, fallacias.* [Tom. III. pag. 658].

13 In this part of his teaching, St Paul says that the public authorities are the ministers of God, and revengers to execute wrath (that is to inflict punishment,) upon evil-doers. And thus he already distinguishes between punishment for the sake of the public good, which the magistrate inflicts in the place of God, and which is to be referred to the vengeance reserved to God; and the vengeance of the passion of revenge, which he had before interdicted. For if that punishment which is inflicted for the sake of the public good is to be comprehended in that interdict, what would be more absurd than, that when he had said that capital punishments are not to be inflicted, he should add, in this the public powers are ordained by God, to require punishment in God's place?

14 (5) A fifth passage alleged by some is 2 Cor. x. 3, *For though we walk after the flesh, we do not war after the flesh; for the weapons of our warfare are not carnal, &c.* But this passage is nothing to

sed divinitus valida ad destructionem munitio; et quæ sequuntur. Sed hic locus nihil ad rem facit. Ostendunt enim tum præcedentia, tum quæ sequuntur, carnis nomine a Paulo ibi intelligi imbecillam corporis conditionem, qualis in aspectum veniebat, et cujus nomine contemnebatur. Huic opponit Paulus arma sua, potestatum scilicet sibi ut Apostolo datam ad coercendos refractarios, quali usus fuerat in Elymam, Corinthium incesti reum, Hymenæum et Alexandrum. Hanc ergo potestatem negat esse carnalem, id est, infirmam, imo contra, validissimam eam esse asserit. Quid hoc ad jus capitalium suppliciorum, aut belli? Imo contra, quia Ecclesia eo tempore publicarum potestatem auxilio destituebatur, ideo ad ejus tutelam prodigiosam illam potestatem Deus excitaverat, quæ deficere ferme cœpit, ex quo Imperatores Christiani Ecclesiæ contigerunt, sicut Manna defecit ubi in terras frugiferas populus Hebræorum pervenerat.

VI.

15 Qui sexto affertur locus Eph. vi. 12. *Induite universam illam armaturam Dei, ut possitis stare adversus artes diaboli; quia non est vobis lucta adversus sanguinem*

⁴ Exempli gratia, Lib. vii. pag. 300; Lib. xiv. pag. 656; Lib. xv. pag. 713, et alibi. J. B.

⁵ *Innocentissime agere eas gentes, quarum victus est simplicissimus*] Dicit idem Philo de Vita Contemplatrice, (pag. 292. A. B.) citans Homeri illud (*Iliad.* xiii. 6): *Γλαυκοφάγων ἀβίωντε δικαιοτάτων ἀνδρώπων.* Lacommedonum inopumque hominum justissima quæ gens.

Justinus de Scythia, (Lib. ii. c. 2): *Aurum et argentum non perinde ut reliqui*

mortales appetunt. Mox: *Hæc continentia morum quoque illis justitiam indidit nihil alienum concupiscentibus; quippe ibidem divitiarum cupido est, ubi et usus.* Et de Scythia in eandem sententiam locus lecta dignus apud Gregoram, Lib. ii. Taxiles Alexandro: *τί δέι πολέμων καὶ μάχης ἡμῖν, Ἀλέξανδρε, πρὸς ἀλλήλους, εἰ μήτε ὕδωρ ἀφαιρησόμενος ἡμῶν ἀφίξας, μήτε τροφήν ἀναγκαζαν, ὑπὲρ ὧν μόνων ἀνάγκη διαμάχεσθαι νοῦν ἔχουσιν ἀν-*

the purpose. For both what precedes and what follows shews that St Paul intends by the term *flesh* the weak condition of his own body, as it appeared to the eye, and on account of which he was despised. To this he puts in opposition his weapons, that is, the power given him to coerce the refractory, such as he had used against Elymas, the incestuous person at Corinth, Hymenæus and Alexander. This is the power which he says is not carnal, that is, weak, but on the contrary, most mighty. What has this to do with the right of capital punishment or of war? Rather on the contrary, because the Church at that time was destitute of the aid of the public authorities, therefore God had raised up for its defence that miraculous power; and this accordingly began to fail as soon as there were given to the Church Chris-

et carnem (supple, tantum, more Hebræo) sed adversus imperia, et quæ sequuntur: agit de pugna quæ Christianorum est qua sunt Christiani, non quam communem habere cum aliis hominibus certis eventibus possunt.

16 Jacobi locus, qui septimo affertur, iv. 1: *Unde bella et pugnae inter vos? nonne ex voluptatibus vestris, quæ militant in membris vestris? Concupiscitis et non habetis: invidetis et affectatis, nec potestis nancisci: pugnatís et bella geritis, nec obtinetis, eo quod non petitis: Petitis et non accipitis, eo quod male petitis, ut in voluptates vestras absumatis*: nihil continet universale: tantum dicit bella et pugnas, quibus tum Hebræi dispersi inter se misere collidebantur (cujus historiæ partem aliquam apud Josephum videre est) ortum habuisse ex causis non probis: quod nunc etiam contingere scimus et dolemus. Sensum ab hoc Jacobi loco non alienum habet Tibulli illud (1 Eleg. xi. 7, 8):

Divitis hoc vitium est auri, nec bella fuere,

Faginus adstabat cum scyphus ante dapes.

Et apud Strabonem non ⁴uno loco notatum videas, ⁹inno-

θραύσει; [Apud Plutarchum, in Alex. p. 698. A. Tom. I.] Quid inter nos, Alexander, bellis et praeliis opus, quando neque ut aquam, neque ut victum necessarium a nobis auferas huc venisti, pro quibus solis pugnare est hominum ratione utentium? Diogenis dictum huc pertinet: οὐ γὰρ ἐκ τῶν μαζοφάγων οἱ κλέπτει καὶ οἱ πολεμοῖ, non enim ex his, qui potentiam edunt, aut vires existunt, aut bellorum auctores. Porphyrius, Lib. II. de non Edendis Animalibus: τὸ

εὐδάπανον καὶ εὐπορον πρὸς συνεχῇ εὐσέβειαν συντελεῖ καὶ τῶν ἀπάντων, quicquid parata facile est et levis sumptus, ad pietatem perpetuam et quidem omnium confert. [Locus exstat pag. 144, ubi in fine legitur, καὶ πρὸς τὸν ἀπάντων. Ex eodem autem Auctore petiitum est dictum præcedens Diogenis, Lib. I. p. 94, idque eo lubentius observo, quod locus ille, ut quidam alii, effugerit diligentiam, non tantum STANLEY, in Hist. Philosophica Anglice edita, sed etiam

Antiq. xviii.
12. seu ultim.
et Lib. seq.

tian Emperors; as the manna failed when the Jews came into a land that bore fruit.

15 (6) The passage adduced from Eph. vi. 11, *Put on the whole armour of God, that ye may be able to stand against the wiles of the devil. For we wrestle not against flesh and blood, (supply only, after the Hebrew usage,) but against principalities, &c.*: refers to the warfare which Christians have to carry on as being Christians; not that which they may have in common with other men under certain circumstances.

16 (7) The passage of St James which is adduced in the seventh place, iv. 1, *Whence are wars and fightings among you, &c.*: contains nothing universal. It only says that the mutual wars and fightings, by which the Hebrews were then universally plagued, (a part of which

centissime agere eas gentes, quarum victus est simplicissimus. Non abeunt hinc ista Lucani (*Phars.* iv. 373, *et seqq.*):

O prodiga rerum
Luxuries, nunquam parvo contenta paratu,
Et quæssitorum terra pelagoque ciborum
Ambitiosa fames, et lautæ gloria mensæ!
Discite quam parvo liceat producere vitam,
Et quantum natura petat. Non erigit egros
Nobilis ignoto diffusus Consule Bacchus,
Non auro myrrhaque hībunt; sed gurgite puro
Vita ređit: satis est populis fluviusque Ceresque.
Heu miseri, qui bella gerunt.

p. 1049. D. Cui adjungi potest Plutarchi illud in Stoicorum contradic-

Eruditissimi illius Interpretis Latini, GODEFRIDI OLEARII, cujus immaturus obitus hand exiguum damnum Reip. literariæ adtulit. In loco Homeri, (ut hoc etiam addam) τὸ Ἀβίω, nomen est Populi, e veteribus Scythis; quod prima observavit Eruditissima matrona, Anna T. Fabri filia, in Notis ad versionem suam Gallicam. *J. B.*]

Aliud ex voluptatibus cupiditate, aliud ex avaritia, aliud ex bonorum aut imperii nimio studio constatur] Verissimam, sed parum meditatam hominibus sententiam, multis egregiis veterum expressam verbis, quid nocebit et aliorum dictis non minus efficacibus confirmare? Athenæus Philosophus apud Diogenem Laërtium, (Lib. x. § 2):

Ἄνθρωποι μοχθήετε τὰ χεῖρονα καὶ διὰ κέρδος Ἀπληστον νεικέων ἀρχετε καὶ πολλήμων.

In mala sudatis miseri: sine fine cupido
Vos agit in rixas bellaque præcipites.

Fabianus Papirius in controversiis Senecæ patris, (Lib. ii. Contr. ix.): *Ecce instructi exercitus, sæpe civium cognatorumque, consenturi manus, constiterunt, et colles equis utrique complentur, et subinde omnis regio trucidatorum corporibus consterntitur, illatorum multitudine cadaverum, vel spoliantium. Si quæsierit aliquis, quæ causa hominem adversus hominem in facinus cōgīt? nam neque feris inter se bella sunt: nec, si*

forent, eadem hominem deceant, placidum proximumque divino genus. Quæ tanta vos fert ira, cum una stirps idemque sanguis sitis? vel quæ furie in mutuum sanguinem egere? quod tantum malum humano generi vel forte vel fato invectum? an ut convivia poculis exstruantur, et tecta auro fulgeant, parricidium tanti fuit? Magna enimvero et laudanda sunt, propter quæ mensam et lacunaria sua potius quam lucem innocentes intueri maluerint. An, ne quid ventri negetur libidinique, orbis servitium expetendum est? quid tandem sic pestiferæ istæ divitiæ expetuntur, si ne in hoc quidem ut liberis relinquuntur? Philo ad Decalogum, (pag. 765): χρημάτων ἔρως, ἡ γυναικός, ἡ δόξης, ἡ τινός ἄλλου τῶν ἡδονῶν ἀπεργαζομένων, ἅρ' γε μικρῶν καὶ τῶν τυχόντων αἴτιος γίνεται κακῶν; οὐ διὰ τοῦτο συγγένεια μὲν ἀλλοτριεῖνται, τὴν φυσικὴν εὐνοίαν μεθαρμολόμεναι πρὸς ἀνίκεστον ἐχθραν. χῶραι δὲ μεγάλαι καὶ πολυάνθρωποι στάσεις ἐμφυλίοις ἐρημοῦνται' γῆ δὲ καὶ θάλαττα πληροῦται τῶν κεκαινοουργημένων τοῦ συμφορῶν, ναυμαχίαις καὶ πεζαῖς στραταῖς; οἱ γὰρ Ἕλληνας καὶ Βαρβάρων πρὸς τὰ ἑαυτοῦ καὶ πρὸς ἀλλήλους τραγωδηθέντες πόλεμοι πάντες ἀπὸ μιᾶς πηγῆς ἐρρήσαν, ἐπιθυμίας ἡ χρημάτων ἡ δόξης ἡ ἡδονῆς. Pecunia-

history we may see in Josephus,) arose from causes not laudable; which is the case even now, as we grieve to know. That avarice and

tionibus : οὐδεὶς γὰρ φύεται ἀνθρώποις πόλεμος ἄνευ κακίας. ἀλλὰ τὸν μὲν φιληδονία, τὸν δὲ πλεονεξία, τὸν δὲ φιλοδοξία τις ἢ φιλαρχία συρρήγνυσι. *Nullum inter homines bellum non ex vitio nascitur : aliud ex voluptatum cupiditate, aliud ex avaritia, aliud ex honorum aut imperii nimio studio conflatur.* Justinus cum Scytharum instituta Lib. II. 2. laudasset ; *Atque utinam reliquis mortalibus similis moderatio, et abstinentia aliena foret : profecto non tantum bellorum per omnia sæcula terris omnibus continuaretur, neque plus hominum ferrum et arma quam naturalis fatutum conditio raperet.* Apud Ciceronem est de Finibus primo : *Ex cupiditatibus odia, dissidia, discordiæ, sedi-* cap. 13.

rum amor, aut femina, aut gloria, aut alicujus demum rei, quæ voluptatem patriat, an parvorum duntaxat et vulgarium malorum causa est? Ob hoc alienantur a cognatis cognati, naturali benevolentia in odium insanabile mutata: regiones autem magnas et facundæ populorum civilibus vastantur dissidiis: tum vero et terra, et mare implentur calamitatibus nove semper repertis per pedestres navalesque acies. Nam bella illa Græcorum Barbarorumque aut inter se, aut horum in illos, etiam tragædiis decantata, ab uno flusere fonte cupiditatis, sive illa divitiarum, sive gloriæ, sive voluptatum fuit. Plinius, *Hist. Nat. Lib. II. cap. 63.* Placatiore tamen ea (Terra) ob hoc utimur, quod omnes hi opulentis exitus ad scelera, cedes et bella tendunt, quamque sanguine nostro irrigamus, insepultis ossibus tegimus. Hieronymus *adversus Jovinianum xi.* Diogenes tyrannos et subversores urbium, bellaque vel hostilia vel civilia, non pro simplici victu olerum pomorumque, sed pro carnis et epularum deliciis asserit excipari. Chrysostomus 1 Cor. xiii. 3, [Tom. II. pag. 77]: *εἰ γὰρ ἅπαντες ἡγάπων καὶ ἡγαπῶντο, οὐδὲν ἂν ἡδίκησεν οὐδεὶς, ἀλλὰ καὶ φόνοι καὶ μάχαι καὶ πόλεμοι καὶ στάσεις καὶ ἀρπαγαὶ καὶ πλεονεξίαι καὶ πάντα ἂν ἐκποδὼν ἐργάζοντο τὰ κοινὰ.* Nam si mutuo se

diligent homines, nemo alterum afficeret injuria, procul essent cedes, et pugne, et bella, et seditiones, et rapina, et defraudationes, et quicquid est malorum. Idem *Orat. ad patrem fidelem de opulentiis loquens*, [Tom. VI. pag. 196]: *οὐ δὲ ἐκείνουι στάσεις καὶ πόλεμοι καὶ μάχαι καὶ πόλεων κατασκαφαὶ καὶ ἀνδραποδισμοὶ καὶ δουλείαι καὶ αἰχμαλωσίαι καὶ φόνοι καὶ τὰ μυρία ἐν τῇ βίῃ κακὰ;* Nonne per hos adveniunt seditiones, et bella, et pugne, et urbium excidia, et plagia, et servitutes, et captivitates, et cedes, et innumera vite mala? Claudianus, [In Rufin. Lib. I. vers. 218, et seqq.]:

Hæc si nota forent, frueremur simplicis culta,
Classica non fremerent, non stridula fraginus
iret,
Non ventus quateret puppes, non machina mu-
roa.

Agathias *historiarum primo*, (cap. i.): *ἐν δὲ πλεονεξίᾳ καὶ ἀδικίᾳ αἱ τῶν ἀνθρώπων ψυχαὶ αὐθαίρετα κατολίσθαι νουσαι, πολέμων καὶ ταραχῶν ἅπαντα ἐμφοροῦσιν.* *Hominum animi sponte ad nimias cupiditates injustitiamque delapsi, implent omnia bellis ac tumultibus.* Concludam multa bene dicta uno Polybii: *αὐτάρκεια τοῦ βίου φιλοσοφία αὐτοδίδακτος.* *Animus necessariis contentus alio ad sapiendum magistro non eget.* [Apud Suidam, in voce *Αὐτάρκεια*].

ambition are the causes of wars, has often been remarked. [See the passages from Tibullus, Strabo, Lucan, Plutarch, Justin, Cicero, Maximus Tyrius, Jamblichus.]

Diss. xiii. p.
142.

Protrept. 13.

VIII.

tionēs, bella nascuntur. Maximus Tyrius: οὐν μεστὰ πάντα πολέμου· αἱ γὰρ ἐπιθυμίαι πλανῶνται πανταχοῦ, περὶ πᾶσαν γῆν τὰς πλεονεξίας ἐπεγείρουσαι. *Nunc omnia bellis plena: ubique enim oberrant cupiditates, et per omnes terras excitant appetitum rerum alienarum.* Jamblichus: καὶ γὰρ πολέμους καὶ στάσεις καὶ μάχας οὐδὲν ἄλλο παρέχει ἢ τὸ σῶμα καὶ αἱ τούτου ἐπιθυμίαι. διὰ γὰρ τὴν τῶν χρησίμων κτῆσιν πάντες οἱ πόλεμοι γίνονται. *Bella, pugnas, seditiones corpus præbet et corporis cupiditates. Nam rerum utibilibium caussa bella omnia oriuntur.*

17 Quod vero Petro dictum est, *Qui gladio ferit, gladio peribit*, cum non ad bellum communiter spectatum, sed ad bellum privatum proprie pertineat (nam et Christus ipse inhibitiæ aut neglectæ defensionis hanc reddit causam, quod regnum suum de hoc mundo non esset, Joan. xviii. 36) suo loco rectius pertractabitur.

IX. 1 Quoties de scripti sensu quæritur, magnam vim habere solet tum usus sequens, tum prudentum auctoritas: quod etiam in divinis scriptis sequendum est. Neque enim probabile est, Ecclesias, quæ ab Apostolis constitutæ sunt, aut subito, aut omnes defecisse ab iis, quæ Apostoli breviter perscripta ore liberalius explicaverant, aut etiam in usum introduxerant. Solent autem ab iis qui bella impugnant adferri

* Bonum esse cum puniuntur nocentes nemo negat] Idem Tertullianus de Anima: *Quis non præferat sæculi justitiam, quam et Apostolus non frustra gladio accinctam contestatur, quæ pro homine sapiendo religiosa est?* (Cap. 38). Et ad Proconsulem Scapulam: *Non te ter-*

remus, qui nec timeamus. Sed velim, ut omnes salvos facere possimus monendo μη θεομαχεῖν. *Potes et officio jurisdictionis tuæ fungi, et humanitatis meminisse, vel quia et vos sub gladio estis.* (Cap. 4).

† Locus est in Lib. De Spectaculis,

17 (8) What was said to Peter, *He that smiteth with the sword shall perish with the sword*, since it does not properly refer to war in its common aspect, but to private war, (for Christ himself gives this reason for prohibiting or neglecting his defence, that his kingdom was not of this world, Joh. xviii. 36,) will be better discussed in its own place.

IX. 1 When we have to inquire into the sense of any writing, we commonly assign great weight both to subsequent usage, and to the authority of the learned: and this is to be attended to also in the sacred writings. For it is not probable that the Churches, which were constituted by the Apostles, should either suddenly or universally have gone astray from the precepts which being briefly expressed in writing, the Apostles had more fully explained in their oral instructions, or

dicta quædam veterum Christianorum : ad quæ tria dicenda habeo.

2 Primum est, ex iis dictis nihil amplius colligi quam pri-
vatam quorundam sententiam, non publicam Ecclesiarum: adde
quod ferme quorum ea dicta sunt, amant ab aliis seorsim ire
et docere quiddam magnificentius; quales sunt Origenes et
Tertullianus, qui nec sibi satis constant. Nam idem Origenes
apud ait a Deo documentum datas *πρὸς τὸ δίκαιους καὶ*
τεταγμένους πολέμους, εἴποτε δέοι, γίγνεσθαι ἐν ἀνθρώ-
ποις *Ut bella justa atque ordinata inter homines gerantur,*
si quando id jubeat necessitas: et idem ille Tertullianus,
qui alibi supplicia capitalia minus probare videtur, dixit,
“Bonum” esse cum puniuntur nocentes nemo negat: Et de
militia hæsitat: nam libro de Idololatria, *Queritur, inquit, an*
fideles ad militiam converti possint, et an militia ad fidem
admitti: Et videtur eo loco propendere in eam sententiam,
quæ militiæ adversatur. At libro de *Corona Militis*, cum
quædam adversus militiam disputasset, mox distinguit, qui
ante baptismum militabant, ab iis, qui post baptismum nomen
dant militiæ. *Plane, inquit, si quos militia præventos fides*
posterior invenit, alia conditio est, ut illorum, quos Joannes
admittebat ad lavacrum; ut centurionum fidelissimorum,
quem Christus probat, et quem Petrus catechizat: ‘dum

*Contra Cel-
sil. p. 115, et
vii. p. 349,
viii. p. 427.
De Coron.
M. 11 et 12.
De Idololat.
19.*

Cap. 19.

Cap. 11.

cap. xix. et ita legitur (nam Auctor ex
memoria illum adferebat) *Bonum est,
quum puniuntur nocentes. Quis hoc,
mini nocens, negabit?* Sic sententia
ἀναγνέσκων majorem habet. Cæterum
vide quæ de his locis, et aliis, Tertul-
liani, diximus in Libro Gallico *De Doc-*

*trina Morali Patrum, Cap. vi. § 6 et
seqq. 25, etc. J. B.]*

*“Dum tamen suscepta fide atque sig-
nata”* Distinctionem, quam hic de mi-
litia affert, alibi ad nuptias applicat,
tum libro de *Monogamia*, tum exhorta-
tione castitatis.

from the usages which they had established. Now those who argue
against war are accustomed to adduce some sayings of the ancient
Christians; on which I have three remarks to make.

2 (1) The first is that from these passages, nothing more can be
collected than the private opinion of certain individuals, not the public
judgment of the Church: add to which, that the persons whose sayings
are quoted are mostly writers who like to go in a path of their own,
and to teach in a very high strain; such are Origen and Tertullian.
But even these writers are not consistent with themselves. For the
same Origen says that bees are an example appointed by God to shew
that just wars may be carried on if it be necessary: the same Tertul-
lian who in other places seems to disapprove of capital punishment,

tamen suscepta fide atque signata, aut deserendum statim sit, ut multis actum, aut omnibus modis cavillandum, (id est cavendum) ne quid adversus Deum committatur. Sensit ergo illos post baptismum in militia permansisse; quod sane minime facturi fuerant, si intellexissent militiam a Christo interdictam; non magis, quam aruspices, magi, ^{et alii vetitarum artium professores in sua arte post baptismum manere permissi sunt.} Eodem libro militem quendam, et quidem Christianum, laudans, *O militem, inquit, in Deo gloriosum.*

Cap. I.

II.

3 Secunda observatio est, quod militiam Christiani sæpe aut improbarunt, aut evitarunt ob temporum circumstantias, quæ vix ferebant militiam exerceri sine actibus quibusdam cum Christiana lege pugnantibus. In literis Dolabellæ ad Ephesios, quæ apud Josephum exstant, videmus Judæos ab expeditionibus militaribus immunitatem postulasse, quod externis permixti non satis ritus legis suæ observare possent, et quia sabbatis ferre arma et magna itinera facere cogerentur. Atque easdem ob causas a L. Lentulo missionem Judæos impetrasse docet idem Josephus: alibique narrat, cum Judæi Roma urbe jussi essent excedere, quosdam militiæ adscriptos, alios punitos quod militare nollent patriarum legum

Antiq. Jud.
xiv. 10. § 12.Ibid. § 13.
Lib. xviii. 3.
§ 5.

^{Et alii vetitarum artium profes-}
sores] Tertullianus *de Idololatria*:
(cap. 5): *ad Ecclesiam non admittuntur*
qui artes exercent, quas Dei disciplina
non recepit. Augustinus *de Fide et*
Operibus: Meretrices et histriones, est

quilibet alii publicæ turpitudinis profes-
sores, nisi solutis aut diruptis talibus
vinculis, ad Christi sacramenta non per-
mittuntur accedere. [Cap. 18, num. 33,
Tom. vi.] De histrione exemplum vide
apud Cyprianum epistola Lxv. de lanis-

says also, *Nobody but a criminal will deny that it is a good thing when criminals are punished.* And as to a military life, he hesitates. In the treatise *De Idololatria*, he seems to incline against it; but in the treatise *De Corona Militis* he distinguishes in favour of the condition of those who were soldiers before they were Christians. He knew that such had continued soldiers, which they would not have done if they had understood that a military life was forbidden by Christ; any more than soothsayers, magicians, and other professors of forbidden arts were permitted to practise their art after baptism. In the same book he addresses a certain Christian soldier, *O glorious soldier in God.*

3 (2) The second observation is that the Christians often avoided or disparaged a military life on account of the circumstances of the time, which scarcely permitted a soldier's life to go on without some acts inconsistent with the Christian law. We see in Josephus that the Jews asked and in some cases received excuse from military duties

reverentia; ob eas scilicet quas diximus causas: quibus accedebat interdum tertia, quod adversus populares suos pugnandum haberent; at κατὰ τῶν ὁμοφύλων ὅπλα λαβεῖν ^{Joseph. in VII. suc. § 6.} ἀθέμιτον, *nefas in populares suos arma sumere*; tunc scilicet cum populares ob patriæ legis observationem periclitabantur. Quoties vero hæc incommoda cavere poterant Judæi, militabant etiam sub externis regibus, sed ἐμμένοντες τοῖς πατρίοις ἔθεσι καὶ κατὰ ταῦτα ζῶντες, ^{Cap. 12.} *perstantes in patriis institutis et ex eorum præscripto viventes*: quod pacisci prius solebant, eodem Josepho auctore. His periculis simillima sunt quæ Tertullianus militiæ suorum temporum objicit, ut libro *de Idololatria*: *Non convenit sacramento* ^{Cap. 11.} *divino et humano, signo Christi et signo diaboli*: quia scilicet per Deos Gentium, Jovem, Martem, atque alios, jurare milites jubebantur. Libro autem *de Corona Militis*: *Excubabit pro templis quibus renuntiavit, et cænabit illic* ^{Cap. 11.} *ubi Apostolo non placet: et quos interdum exorcismis fugavit, noctibus defensabit?* mox: *Quanta alia in delictis circumspici possunt custrensiū munium, transgressioni interpretanda?*

4 Tertium quod notamus hoc est, Christianos primorum III.

tis, lenonibus, victimarum redemptoribus, apud Tertullianum: (*De Idololatr.* c. 11), de auriga Ciroensi, apud Augustinum. [Immo in Epistola Episcoporum, de rebus in Arelatensi Concilio gestis, Appendic. Tom. ix. col. 16.

Adde *Constitution. Apostolic.* Lib. viii. cap. 32].

* *Perstantes in patriis institutis*
Verba Josephi xi. *Historiæ Antiquæ.*
(Cap. viii. § 5).

on the ground of their interfering with their national usages. [See the passages in the text.] Very similar are the difficulties which Tertullian objects to the military profession of his time; as in the book *De Idololatria*, *There is no consistency between the military oath (sacramentum) and the divine sacrament*: namely, because the soldiers had to swear by the heathen gods, Jupiter, Mars and others; but in the book *De Corona Militis*, he says, *Shall he keep guard in front of the temples which he has renounced, and sit in places such as the Apostle condemns, and be the defender by night of those powers which his exorcisms have driven away in the day?* And again, *How many other things are there in the duties of a soldier which the Christian must interpret as transgressions?*

4 (3) The third remark which I make is this, That the Christians of the first times were animated by so ardent a desire to do what was best, that they often accepted the divine counsels as if they

temporum tanto ardore succensos fuisse ad præclarissima quæque capessenda, ut sæpe consilia divina pro præceptis amplecterentur. * Christiani, inquit Athenagoras, οὐ δικάζονται τοῖς ἀπράξουσιν, *adversus sua rapientes judicio non contendunt.*

Apolog. 17. Salvianus jussum a Christo ait, ut ea ipsa de quibus lis est relinquamus, dummodo litibus exuamur. Atqui 'id ita generaliter sumtum consilii forte est et vitæ sublimioris, at non in præcepto positum. Simile est quod plurimi veterum omne juramentum improbant, nulla exceptione addita, cum tamen Paulus in re gravi juraverit. Christianus apud Tatianum, *στρατηγίαν παρήτημαι, præturam recuso*: apud Tertullianum, *Christianus nec ceditatem affectat.* Sic Lactantius justum (qualem vult esse Christianum) negat belligeraturum; sed ita ut simul navigaturum neget. A secundis nuptiis quam multi veterum Christianos debortantur? Quæ omnia sicut laudabilia, eximia, Deo apprime grata sunt, ita nullius legis necessitate a nobis exiguntur. Atque hæc solvendis quæ obijciuntur sufficient.

De Gubernat. Dei, lib. p. 73.

Apolog. 46. *Inet. Div. v. 17. n. 12.*

X. 1 Nunc ut nostra firmemus, primum non desunt nobis scriptores, et quidem antiquiores, qui et capitalia supplicia,

* Quæ ad *Consilia Evangelica* ab Auctore nostro, aut aliis referuntur, vel per se nec bona sunt, nec mala, vel habent necessitatem quamdam *præcepti*, respectu hujus vel illius hominis, in certis casibus et circumstantiis. Quæ de re

fuse egimus in nostris ad hunc locum Gallicis notis: ubi simul, unde ortus sit error eorum, qui hanc distinctionem inter *Præcepta* et *Consilia Evangelica* excogitarunt, ostendimus, studiumque ejusmodi *Consiliis* utendi facile homines

had been commands. Thus Athenagoras says that the Christians do not resist by the law those who plunder them; Salvian says that we are commanded to give up that which is the subject of a suit, that we may be rid of litigation. And, speaking generally, such is perhaps the tendency of Christian counsel, and the scheme of the highest Christian life; still it is no command. In like manner, many of the early fathers disapprove of oaths altogether, without making any exception; though Paul himself on an important occasion used an oath. In this way Lactantius says that a righteous man (by which he means a Christian) will not be a soldier; but he also asserts that he will not be a sailor. How many of the ancient Christian writers exhort their followers against second marriages! And all these things are laudable, excellent, very agreeable to God, but are not required of us by any law of necessity. And these remarks will suffice for solving the objections to the lawfulness of war taken from the early Christian writers.

X. 1 But now to confirm our case, in the first place there are

et quæ inde pendent bella, sentiant a Christianis licite posse usurpari. Nam Clemens Alexandrinus Christianum ait, si ad imperium vocetur, ut Moses, futurum vivam subditis legem, et præmio affecturum bonos, pœnis malos. Et alibi habitum Christiani describens, decere eum ait intactis esse pedibus, nisi forte militet. ¹In Constitutionibus, quæ Clementis Romani nomen præferunt, Libro VII. cap. 3. legimus: *οὐχ ὡς παντὸς φόνου φαύλου τυγχάνοντος, ἀλλὰ μόνου τοῦ ἀθώου, τοῦ δ' ἐνδίκου ἄρχουσι μόνοις ἀφωρισμένον* non quasi omnis cædes illicita sit, sed ea, quæ est innocentis: ita tamen, ut quæ justa est, magistratibus solis sit reservata. Pædag. II. 11.

2 Sed, auctoritatibus privatis sepositis, ad publicam Ecclesiæ veniamus, quæ maximi debet esse ponderis. Dico igitur, nunquam a baptismo rejectos, aut ab Ecclesia excommunicatos eos, qui militabant, quod tamen et factum oportuit et factum fuisset, si militia cum novi fœderis conditionibus pugnasset. In dictis modo Constitutionibus, Lib. VIII. cap. 32, agit scriptor ille de iis, qui antiquitus ad baptismum admitti, aut ab eo rejici solerent: *στρατιώτης προσίων διδασκέσθω μὴ ἀδικεῖν, μὴ συκοφαντεῖν· ἀρκεῖσθαι δὲ τοῖς διδομένοις ὀψωνίοις· πει-*

a veræ Virtutis via avertere, tantum abest ut ad illam sit incitamentum. *J. B.*

¹ *Id ita generaliter sumtum consilii forte est et vitæ sublimioris* Concilium Carthaginense IV: *Epicopus nec provo-*

catus de rebus transitoriis litiget. Adde Ambrosium Lib. II. *Offic.* cap. xxi. et Gregorium Magnum libro II. Ind. xi. *Epist.* I VIII.

² *In Constitutionibus* Videtur scriptus is liber finiente sæculo secundo.

not wanting writers on our side, more ancient than those just quoted, who assume that both capital punishments and wars may be lawfully used by Christians. Clemens Alexandrinus says that the Christian, if he is called to empire, will be like Moses, a living law to his subjects, will reward the good and punish the bad. And in another place, describing the dress of the Christian, he says he will go barefoot, except he happen to be a soldier. And in the Constitutions which bear the name of Clemens Romanus, it is said that, *Not all putting to death is unlawful, but only that of an innocent man: but that which is right in this case, it is for the magistrates alone to judge.*

2 But setting aside private authorities, let us come to the public authority of the Church, which ought to be of the greatest weight. I say then that soldiers were never rejected from baptism, or excommunicated, on that account; which should have been done and would have been done, if a military life had been at variance with the Christian covenant. In the Constitutions already quoted we read, *A soldier*

Cap. 42.

Cap. 37.

Cap. 5.

Cap. 1.

θόμενος προσδεχέσθω: miles baptismum postulans doceatur ab injuriis et vexationibus abstinere: contentus esse suis stipendiis. Si his pareat, admittitor. Tertullianus in *Apologetico* ex persona loquens Christianorum; *navigamus*, inquit, *et nos vobiscum, et militamus*. Paulo ante dixerat: *externi sumus et vestra omnia implevimus, urbes, insulas, castella, municipia, conciliabula, castra ipsa*. Eodem libro narraverat ^a M. Aurelio Imperatori Christianorum militum precationibus imbrem impetratum. In *Corona* militem illum qui coronam abjecerat, constantiorem ait fuisse cæteris fratribus, et multos ei ostendit fuisse Christianos commilitones.

Epist. 33.

3 Accedat, quod et milites nonnulli, pro Christo tormenta mortemque perpassi, eundem cum cæteris martyribus honorem ab ecclesia acceperunt, quos inter memorantur ^b tres Pauli comites; sub Decio Cerialis, sub Valeriano Marinus, quinquaginta sub Aureliano, Victor, Maurus, et Valentinus magister militum sub Maximiano, circa idem tempus Marcellus Centurio, Severianus sub Licinio. Cyprianus de Laurentino et Ignatio

^a M. Aurelio Imperatori] Vide et Xiphilinum de hac historia.

^b Tres Pauli comites] Adde militem quendam a Cornelio baptizatum, ejus apud Adonem mentio.

^c In omnibus Editionibus heic erat supplicii: sed vel Auctorem, vel Ty-

pographos, vocem illam ex incogitantia posuisse, pro *judicii*, ex sequentibus manifestissimum est; quum heic non agatur de spectando supplicio reorum, sed de *judicando* in causa capitis. Et ita apud Tertullianum *de Idololatr.* cap. 19. *An Militia ad fidem admitti...cui*

seeking baptism is to be taught to abstain from violence and extortion, and to be content with his wages. If he conform to this, let him be admitted. Tortullian, in his *Apology*, speaking in the character of the Christians, says, *We act with you as sailors, as soldiers*. A little before he had said: *We are strangers to you, and yet we have filled all the departments of your society; your cities, islands, castles, towns, councils, even your camps*. In the same book he had narrated that a shower was sent in answer to the prayers of Christian soldiers in the army of M. Aurelius. In the *de Corona*, he says that the soldier who had cast off the crown was a more stedfast man than his brethren, and he shews that he had many Christian fellow-soldiers.

3 Add to this, that some soldiers, who suffered torments and death for Christ, received from the Church the same honour as the other martyrs: among these are recorded three companions of St Paul; Cerialis under Decius; Marinus under Valerian; fifty persons under Aurelian; Victor, Maurus, and Valentinus, soldier-master under Maximian; about the same time Marcellus the Centurion, and Severianus under Licinius. Cyprian writing concerning Laurentinus and

Afris: In castris et ipsi quondam sæcularibus militantes, sed veri et spirituales Dei milites, dum diabolum Christi confessione prosternunt, palmas Domini et coronas illustres passione meruerunt. Et hinc apparet quid de militia senserit communitas Christianorum, etiam priusquam imperatores Christiani essent.

4 Capitalibus judiciis ⁷si non libenter interfuerunt Christiani illis temporibus, haud mirum videri id debet, cum plerumque de Christianis ipsis esset judicandum: adde quod et in cæteris rebus leges Romanæ duriores erant, quam lenitas Christiana patiatur: quod vel solo ^cSiliani Senatusconsulti exemplo satis patet. Postquam vero Constantinus Christianam religionem et probare, et promovere cœpit, non ideo desierunt capitalia supplicia. Imo ipse Constantinus inter alias leges de parricidis culeo insuendis legem tulit, quæ extat Codice Titulo de iis qui parentes vel liberos occiderunt; quanquam *Lep. untc.* alioqui in suppliciis exigendis mitissimus fuerit, ita ut ab historicis non paucis reprehendatur ^dnimiæ lenitatis nomine.

non sit necessitas immolationum, vel CAPITALIUM judiciorum. J. B.

^c *Siliani Senatusconsulti*] Cnjus asperitatem mitigavit Adrianus Imperator, ut apud Spartianum est. Asperis Romanorum legibus addi possunt, quæ servum nisi tortum testimonium dicere

vetant. [Vid. Cod. *De Serv. fugitivis* etc. L. 4. et Clar. NOORDTII *Prob. Juris*, Lib. 1. cap. ult. in fine. *J. B.*]

^d *Nimiæ lenitatis nomine*] Zonaras, [Lib. XIII. cap. iv. pag. 11, T. II. *ed. Reg.*] τοῖς μεταβαλλομένοις ἐκ πονηρίας φιλόανθρωπον διατιθέμενος, δλεγεν

Ignatius, two African Christians, says, *They formerly served in the armies of men, but being true and spiritual soldiers of God, they overthrew the devil by the confession of Christ, and by their suffering obtained as their reward, the palms and immortal crowns given by their divine Master.* And hence it appears what the Christian community thought of a soldier's profession, even before the emperors were Christians.

4 That the Christians at that time did not like to be present at capital punishments, ought not to seem strange, since Christians were often the subjects of such punishments. Add to this that the Roman laws were too harsh to agree with Christian kindness, as the Silian Law may serve to shew*. But after Constantine had begun to favour and encourage the Christian religion, capital punishments were still not discontinued. Constantine himself established a capital punishment of a peculiar kind for parricides and child-murderers; though in other respects very merciful, so that he was blamed by many for his excessive lenity. Also he had in his army many Christians, as history teaches

* [The Law that when a man was killed in his own house, all his slaves should be put to death. See Tacit. *Ann.* XIV. 42.]

De Re
MILIT. II. 5.

Tum vero in exercitu suo plurimos habuit Christianos, ut nos historiæ docent, et labaro Christi nomen inscripsit. Ex eo etiam mutatum est sacramentum militare in eam formam, quæ exstat apud Vegetium: *per Deum et Christum et Spiritum Sanctum, et per majestatem Imperatoris, quæ secundum Deum generi humano diligenda est et colenda.*

Tribuitur
male Augu-
stino, infr. II.
25. § 9. n. 3.
Lib. I. 27.

5 Neque eo tempore ex tot Episcopis, inter quos multi erant durissima quæque passi pro religione, vel unus fuisse legitur, qui aut Constantinum ab omnibus omnino capitalibus suppliciis et bello, aut Christianos a militia injecto divinæ iræ metu absterruerit, cum tamen plurimi essent acerrimi custodes disciplinæ, et minime dissimulantes eorum, quæ ad officium tum Imperatorum, tum aliorum pertinerent: qualis et Theodosii tempore fuit Ambrosius, qui Sermone VII. ita ait: *Non militare delictum est, sed propter prædam militare peccatum est: et de Officiis: Fortitudo, quæ vel bello tuetur a barbaris patriam, vel domi defendit infirmos, vel a latronibus socios,*

ἔτι τὸ νοσοῦν μέλοι ἀποκοπτεῖν καὶ σσεσηπότε, ἵνα μὴ καὶ τοῖς ὑγιαίνουσι λυμανεῖται, οὐ μὲν τοι τὸ ὑγιεῖν ἦδη τυχόν ἢ καὶ ὑγιαζόμενον. *Clementem se ostendebat iis, qui pravam vitam deseruerant, quod diceret abscindendum membrum egrotans ac putridum, ne sana contagio corrumpat, non id quod aut sanatum jam sit aut sanescat. Vide et Eusebium, [de Vita Constantini, Lib. IV. cap. 31]. Sicut de nimia Constantini lenitate Christianos, ita de Heraldi Re-*

gis questos Danos apud Saxonem historicum invenias. [Lib. XI. p. 194].

* *Sæpe Episcopos*] Augustinus: [ep. 153. vulg. 54]. *Officium Sacerdotis est intervenire pro reis.* In ejus epistolis multa sunt hujus bonitatis specimina. [Confer heic quæ habet RADULPH. FORNEBIUS, Rer. Quotid. Lib. VI. cap. 7].

[†] *Ut qui ad Ecclesiam confugissent*] Vide Chrysostomum XVI. de Statuis. [Nil ibi ad rem. Voluit forte dicere *Orat.*

us, and inscribed his banner with the name of Christ. From that time also the military oath was changed into the form, which is extant in Vegetius, *By God, and Christ, and the Holy Ghost, and by the majesty of the Emperor, which next to God is to be revered and beloved by mankind.*

5 Moreover, out of so many bishops who had braved the extremest sufferings for religion, there was not at that time a single one, who tried to scare Constantine from capital punishments and war, or Christians from military service, by the prospect of the divine anger: though many of them were most strenuous guardians of religious discipline, and not at all given to pass over what concerned the duty, either of the Emperor, or of others: such as was Ambrose in the time of Theodosius, who in his seventh Sermon says: *It is not soldiering which is a sin, but soldiering for plunder:* and in his *Duties: The courage which defends our country from barbarians abroad, or the help-*

plena justitia est. Hoc argumentum tanti mihi videtur, ut nihil ultra requiram.

6 Neque tamen ignoro, *sæpe episcopos, et plebem Christianam, interpositis precibus suis avertisse pœnas, præsertim capitales: morem quoque introductum, ^fut qui ad ecclesiam confugissent, non nisi vitæ servandæ fide data redderentur; et ^ut circa pascha carcere emitterentur, quos sua crimina attingebant; sed, qui cum cura hæc omnia et si qua his sunt similia expendet, inveniet, signa hæc esse Christianæ bonitatis omnem rapientis clementiæ occasionem, non omnia judicia capitalia damnantis animi: unde et locorum et temporum illa beneficia, et preces ipsæ ^bexceptionibus quibusdam temperabantur.

7 Objiciunt hic nobis nonnulli XII. canonem Synodi Nicæensis, qui Latine sic habet: ⁱ*Quicumque vocati per gratiam, primum quidem ardorem fidei suam ostenderunt, et cingulum militiæ deposuerunt, postea vero ut canes ad suum*

L

XVII. ubi aliquid de Monachis, pag. 575, in fin. Tom. VI. J. B. Concilium Aurelianense cap. 3. legem Wisigothorum. Libro VI. tit. v. 16; IX. tit. III. c. 3.

^s *U: circa Pascha*] L. Nemo. 3. C. de Episc. audientia.

^b *Exceptionibus quibusdam*] Quas vide apud Cassiodorum, XI. 40. et cap. inter alia, 6. de immunitate ecclesiastica, in Decretalibus.

ⁱ *Quicumque vocati*] Simeon Magister in ejus canonis epitome: οἱ βιαζόμενοι

καὶ δόξαντες ἀντιστῆναι, εἰτα καταβήμενοι τῇ δακρυβίᾳ καὶ δαστυρατεινόμενοι, δεκαετίαν ἀφορίζεσθῶσαν. Qui vi adhibita viri sunt restitisse, sed ab impietate victi sunt et militiam resumere, decem per annos abstinere. Eundem hujus canonis sensum exprimunt Balsamo et Zonaras, et Rufinus libro X. cap. VI. [Adde BINGHAM, *Origines Eccles.* Lib. XI. cap. V. § 10. Tom. IV. pag. 248, et seqq.]

less from harm at home, or society from robbers, is mere justice. This argument seems to me so strong that I require nothing more.

6 Not that I am ignorant that bishops and Christian men often interposed with their instructions to avert punishment, especially capital punishment; nor that a practice was introduced that those who had taken refuge in the Church, should not be given up except on the assurance that their lives would be spared; and also that at the time of Easter, criminals who were in prison were set free. But any one who examines these circumstances with care will see that they are the marks of Christian kindness, seizing every occasion of clemency; not manifestations of an opinion condemning all capital punishments; and accordingly the places and times and interposition which procured such indulgence were limited by certain exceptions.

7 (1) Here some object to us the twelfth Canon of the Council of Nicæa, which directs that, *If persons called by grace, have first*

vomitum reversi sunt; ita ut aliqui et pecuniam darent, et beneficiis militiam repeterent, hi decem annis jaceant, post triennii auditionis tempus. In his autem omnibus observari oportet propositum et modum pœnitentiæ. Quicumque enim, et timore, et lacrymis, et patientia, et bonis operibus conversionem absque simulatione demonstrant, hi definitum tempus auditionis implentes, tum demum orationibus communicabunt, et postea licebit episcopo de his aliquid humanius cogitare. Quicumque vero indifferenter tulerunt, et habitum ecclesiam introeundi sibi arbitrati sunt ad conversionem sufficere, hi definitum tempus omnino impleant. Vel ipsum tredecim annorum tempus satis indicat, non de levi aut ambiguo, sed gravi aliquo atque indubitato crimine hic agi.

8 Agitur autem haud dubie ^k de idololatria: nam quæ canone xi. præcesserat mentio temporum Licinii, in hoc canone repetita tacite haberi debet: ut sæpe Canonum sequentium sensus a prioribus pendet. Vide in exemplum Canonem xi. Concilii Eliberini. Licinius autem, verba sunt Eusebii, στρατιώτας ἐκέλευεν ἀποβάλλεσθαι τοῦ ἀξιώματος, εἰ μὴ τοῖς δαίμοσι θύειν αἰροῖντο, *milites militia exuebat, nisi Diis sa-*

*De Vita
Constantin.
i. 54.*

^k *De idololatria*] Quod principale crimen, summus sæculi reatus dicitur Tertulliano *de Idololatria*, (Cap. 1.): *gravissimum et extremum delictum Cyprian. Epist. xv.*

^l *Nisi Diis sacrificare vellent*] Sulpitius Severus (*Hist. Sacr. Lib. ii. cap. 33*): *Sane tum Licinius, quia adversum Constantinum de imperio certavit, milites suos litare præceperat: abnuentes*

renounced the military profession (cingulum militiæ deposuerunt,) and then returned to it, as dogs to their vomit; let them, after being Hearers for three years, be Penitents for ten years; with power in the bishop to modify their sentence according to the evidence of their repentance.*

Here the mention of a penitence of thirteen years indicates at once that there is question not of some slight and ambiguous, but of some grave and undoubted crime.

8 And in fact there is no doubt that *Idolatry* is the crime in question; for what had been said before in the eleventh Canon, must be understood as tacitly repeated here: as is customary in Canons. Now Licinius, as we learn from Eusebius, made men quit the military profession except they would sacrifice to the heathen gods, which Julian afterwards imitated; on which account Victorius and others are said to have given up the military profession (*cingulum abjecisse*) for Christ. The same thing had before been done in Armenia under Diocletian by one thousand one hundred and four persons, of whom there is

[* There were four degrees of Penitence in the early Church, Πρόσκλησις, Ἀκρόασις, Ὑπόπτησις, Σύστασις. *Gronovius.*]

crificare vellent; quod et Julianus postea imitatus est, quam ob causam Victricius atque alii cingulum pro Christo abjecisse leguntur. Idem olim sub Diocletiano fecerant in Armenia mille centum quatuor, quorum in martyrologiis mentio: et in Ægypto Menna, et Hesychius. Sic ergo et Licinii temporibus multi abjocere cingulum, quorum fuit Arsacius inter Confessores nominatus, et Auxentius factus postea Mopsuestiæ Episcopus. Quare his, qui semel conscientia puncti cingulum abjecerant, reditus ad militiam sub Licinio non patebat nisi per fidei Christianæ abnegationem: quæ quia eo erat gravior, quo prior ille actus majorem in illis legis divinæ cognitionem testabatur, ideo hi defectores gravius etiam puniuntur quam illi, de quibus egerat præcedens canon, qui sine periculo vitæ aut facultatum amittendarum Christianismum abjecerant. Generaliter autem de omni militia interpretari canonem, quem produximus, ab omni ratione alienum est. Aperte enim testatur historia, his, qui sub Licinio militiam abjecerant, neque Licinio imperante ad eam redierant, ne fidem Christianam violarent, a Constantino datam optionem, immunesne esse a militia vellent, an ad militiam redire: quod haud dubie multi fecerunt.

Sozomen. H.
Ecc. v. 17.

Euseb. VII.
Constant. II.
33.

militia rejiciebat. Ob hanc causam Valentinianus, qui imperator postea factus est, sub Juliano abiecit cingulum. Non dissimile est quod Victor

Uticensis narrat, multos sub Hunericho Rege militiam temporalem abjecisse, quia cum Arianismo erat connexa.

mention in the Martyrologies; and by Menna and Hesychius in Egypt. And thus at the time of Licinius many renounced the military profession; among whom was Arsacius, who is named among the Confessors, and Auxentius, who was afterwards bishop of Mopsuesta. And thus those who, pricked by conscience, had once left the military profession, could not return to it under Licinius, except by renouncing the faith of Christ; and this transgression was the more grievous, inasmuch as their former act shewed that they had knowledge of the divine law; wherefore those defaulters are punished even more severely than they who are mentioned in the preceding Canon, who, without danger to their life or fortune, had renounced Christianity. But to interpret the Canon which we have quoted as referring to a military life in general, is contrary to common reason. For history clearly testifies that those who under Licinius had renounced military life and had not returned to it under Licinius, in order that they might not violate the Christian faith, had the option given them by Constantine, whether they would be excused military service or enter the army; and no doubt many of them did the latter.

II.
Epist. xc. ad
Rustic.
Episc.

9 Sunt et qui Leonis epistolam objiciant, quæ dicit, *Contrarium esse Ecclesiasticis regulis, post penitentiae actionem redire ad militiam sæcularem*. Sed sciendum, in penitentibus non minus quam in clericis et ascetis exactam fuisse vitam non quovis modo Christianam, sed eximie cujusdam puritatis, ^mut tanto exemplo essent ad correctionem, quanto ad peccandum fuerant. Similiter in consuetudinibus antiquissimis Ecclesiæ, quæ, quo augustiori nomine commendabiliores essent, Canones Apostolici vulgo appellabantur: Canone LXXXII. editur: *Ne quis episcopus, presbyter, aut diaconus, militia vacet, et utrumque retineat, officium Romanum et functionem sacerdotalem*. Quæ enim Cæsaris sunt Cæsari, quæ Dei Deo. Quo ipso ostenditur, his qui cleri honorem non sperant Christianis militiam non fuisse interdictam.

10 Hoc amplius, etiam ⁿad clerum admitti vetabantur, qui post baptismum aut magistratus attigissent, aut munera bellica, ut in epistolis Syricii et Innocentii, et in Concilio To-

^m Ut tanto exemplo essent ad correctionem, quanto ad peccandum fuerant] Leo epistola xc. ad Rusticum: *Illicitorum veniam postulantem oportet etiam multis licitis abstinere*. In epistola episcoporum ad Ludovicum Regem legimus: *Quilibet tanto a se licita debet abscindere, quanto se meminit et illicita perpetrare*. In Capitulis Calvi: *Tanto quisque majora querat bonorum operum lucra, quanto graviora sibi intulit damna*

per culpam.

ⁿ Ad clerum admitti vetabantur] Eusebius *Demonstrationum*, Lib. i. duplicem describit Christianorum vitam, aliam ἐντελή, aliam inferiorem: qui in hæc sunt, eos inter alia τοῖς κατὰ τὸ δίκαιον στρατευομένοις τὰ πρακτέα ὑποτίθεσθαι, iis qui jure militant agenda indicare. (Cap. 8).

° Nulla alia cura ac labore] Vide Canonem Concilii Moguntini apud Gra-

9 (2) Some object to us the epistle of Leo, which says, *It is contrary to ecclesiastical Rule, to return to a military life after act of penitence*. But we are to recollect that penitents, no less than clerical persons and ascetics, were required to lead a life not only Christian, but of eminent purity, that as great an example might be given for correction as had been given for sin. In like manner in the record of the ancient usages of the Church, which, to give it authority, is commonly called the Apostolic Canons, it is directed: *No Bishop, Priest, or Deacon, shall be a soldier, or shall have the characters of a Roman officer, along with his sacred function*. The things which are Cæsar's are for Cæsar; those which are God's are for God. Which passage shews that those who did not seek the honour of the clerical profession were not forbidden to be soldiers.

10 More than this; those were forbidden to be admitted to the clerical order who after baptism had either held a magistrate's office, or a command in war; as we may see in the epistles of Syricius and

letano videre est. Legebantur scilicet clerici non ex quovis modo Christianis, sed ex iis, qui vitæ exactissimæ specimen dedissent. Adde quod militiæ et quorundam magistratuum perpetua non erat obligatio; at sacro ministerio addicti ^o nulla alia cura ac labore quotidiano inde abstrahi debebant: qua de causa et sextus canon constituit, ne Episcopus, presbyter, aut diaconus sæculares curas administret, octuagesimus ne publicis se administrationibus immittat: et inter Africanos Canones sextus, ^p ne procurationem rerum alienarum suscipiat, aut causarum patrocinium; sic eisdem ^q tutores constitui nefas judicat Cyprianus.

11 At pro nostra sententia expressum Ecclesiæ iudicium habemus in Concilio primo Arelatensi, quod habitum est sub Constantino. Ejus enim Concilii Canon III. sic habet: *De his, qui arma projiciunt in pace, placuit abstinere eos a communionē*: id est, qui militiam deserunt extra tempora persecutionis. ^r Id enim pacis nomine intelligi volebant Christiani, ut ex Cy-

tianum, titulo, Ne Clerici vel Monachi. [Immo in *Decretalibus*, Lib. III. tit. I. cap. 1].

^p Ne procurationem rerum alienarum suscipiat] Vide *Epistolam Hieronymi ad Nepotianum*.

^q Tutores constitui nefas judicat Cyprianus] In epistola ad presbyteros, diaconos et plebem Furnis consistentem. [Epist. I.] Adde I. Generaliter, 52. c. de *Episcopis et Clericis*.

^r Id enim pacis nomine intelligi volebant] Tertullianus de *Idololatria*: (cap. 19). Imo quomodo etiam in pace militabit? Idem de *Fuga persecutionum*: *Nostræ paci quod est bellum quam persecutio?* (cap. 3): Cyprianus epistola XVI. Quando ipsa ante mater nostra Ecclesia pacem de misericordia Domini prior sumserit: Epistola XXI: Cum Dominus ceperit ipsi Ecclesiæ pacem dare: Epistola XXX: Ecclesiæ pacem sustinen-

Innocentius and in the Council of Toledo. In fact, clerical persons were taken not from Christians of every kind, but from those who had given an example of a most correct life. Add to this, that the obligations of military service and of some magistracies was not perpetual; but those who were devoted to the sacred ministry, were not allowed to be drawn from it by any other daily care and labour. On which account the sixth Canon also directs that No Bishop, Priest, or Deacon should administer secular cases, and the eightieth, that he shall not even involve himself in public administration; and the sixth of the African Canons, directs that he shall not undertake a trust or advocacy in the affairs of others; as Cyprian thinks that they should not even undertake the office of guardian.

11 We have the express judgment of the Church on our side in the council of Arles, held under Constantine: for the third Canon of the Council says thus: *Those who cast away their arms in peace shall abstain from the communion*: that is, those who leave the army in a

priano et aliis apparet. Accedat exemplum militum sub Juliano, non modico profectu Christianorum, ut qui morte sua Christo reddere testimonium parati essent: de quibus sic Ambrosius: *“Julianus imperator, quamvis esset apostata, habuit tamen sub se Christianos milites: quibus cum dicebat; Producite aciem pro defensione reipublicæ, obediebant ei: cum autem diceret eis: Producite arma in Christianos, tunc agnoscebant imperatorem cæli.* Talis et multo ante fuerat Thebæa legio, quæ Diocletiano imperante a Zabda tricesimo Hierosolymorum Episcopo Christianam religionem acceperat, et deinde in omne sævum memorabile edidit Christianæ constantiæ et patientiæ exemplum, quod ⁹infra a nobis memorabitur.

12 Hoc loco satis sit illam eorum adferre vocem, quæ Christiani militis officium solida brevitate exprimit: *Offerimus nostras in quemlibet hostem manus, quas sanguine innocentium cruentare nefas ducimus. Dexteræ ipsæ pugnare adversus impios et inimicos sciunt, laniare pios et cives nesciunt. Meminimus nos pro civibus potius quam adversus*

dam, id est expectandam: de Lapsis, disciplinam pax longa corruperat. (pag. 123.) Sulpitius Severus: (Lib. II. cap. 32.) *Antonino Pio imperante pax Ecclesiis fuit: mox: Interjectis deinde annis xxviii. pax Christianis fuit: et in Constantinensi ætate: (ibid. cap. 33). Exinde tranquillis rebus pace perfuimur. Et initio historiarum: Verationesque populi Christiani, et mox pacis tempora.*

(Lib. I. cap. I.)

⁸ Ambrosio equidem verba hæc tribuuntur a Gratiano, Caus. XI. Quæst. III. Can. 94. sed non indicato loco. Similis est locus Augustini, ibi etiam relatus, Can. 98. ex Comm. in Psalmum 124. Unde priorem forte natum esse, in Rubrica conieciunt. J. B.

⁹ Cap. IV. hujus Libri, § 7, num. 10, et seqq. ubi vide quæ monebimus. J. B.

time when there is no persecution raging; for that is what the Christians meant by peace, as appears in Cyprian and others. Add to this the example of the soldiers under the Emperor Julian, Christians of no common proficiency, who were ready to render testimony to Christ by their deaths: they were willing to fight in defence of the State, but when commanded to use their weapons against Christians, they acknowledged the Emperor of Heaven. Of like character had before been the Theban Legion under Diocletian, of which we shall speak hereafter.

12 At present it may suffice to quote the expressions of those who describe the office of the Christian soldier with compact brevity: *We offer to you our arms as ready to use them against any enemy, though we refuse to stain them with the blood of the innocent. Our right hands know the way to fight against the impious and the adversary, but they have not the art of butchering the good man and the fellow-citizen. We recollect*

cives arma sumpsisse. Pugnavimus semper pro justitia, pro pietate, pro innocentium salute: hæc fuerunt hactenus pretia periculorum. Pugnavimus pro fide, quam quo pacto conservemus tibi (ad imperatorem sermo est) si hanc Deo nostro non exhibemus? Basilius de antiquioribus Christianis sic loquitur: τοὺς ἐν πολέμοις φόνους οἱ πατέρες ἡμῶν ἐν τοῖς φόνοις οὐκ ἐλογίσαντο, ἐμοὶ δοκεῖ, συγγνώμην δόντες τοῖς ὑπὲρ σωφροσύνης καὶ εὐσεβείας ἀμυνομένοις: *Eas quæ in bello perpetrantur cædes, majores nostri pro cædibus non habuere, excusatos habentes eos, qui "pro pudicitia ac pietate decertant.*

* *Pro pudicitia* etiam habet interpres vulg. *Epist. ad Amphilocho.* unde hæc petita sunt, *Can. 13, pag. 26 D.* Tom. III. *Ed. Paris. 1638.* Sed vide-

tur hæc vox latiore heic habere significationem. Cæterum vide quæ diximus in Libro Gallico *De Doctrina Morali Patrum*, Cap. xi. § 1, et seqq. *J. B.*

that we have taken arms for our citizens rather than against them. We have always fought for justice, piety, the protection of the innocent; those have hitherto been the rewards of our labours. We have fought for our faith: and how shall we preserve our faith towards thee (meaning the Emperor), if we do not shew our faith towards God?

[The quotation from Basil seems an after-thought.]

CAPUT III.

BELLI PARTITIO IN PUBLICUM ET PRIVATUM. SUMMI IMPERII EXPLICATIO.

- | | |
|---|---|
| <p>I. <i>Belli divisio in publicum et privatum.</i></p> <p>II. <i>Non omne bellum privatum, post judicia constituta, illicitum esse jure naturali, defenditur; additis exemplis.</i></p> <p>III. <i>Ac ne jure quidem Evangelico, cum solutione objectionum.</i></p> <p>IV. <i>Belli publici divisio in solenne et minus solenne.</i></p> <p>V. <i>An bellum sit publicum, quod geritur auctoritate magistratus summam potestatem non habentis, et quando.</i></p> <p>VI. <i>In quibus rebus consistat potestas civilis.</i></p> <p>VII. <i>Quæ potestas sit summa.</i></p> <p>VIII. <i>Refellitur sententia, quæ statuit summam potestatem semper esse penes populum: et solvuntur argumenta.</i></p> <p>IX. <i>Refellitur sententia, quæ statuit semper mutuam subjectionem regis et populi.</i></p> <p>X. <i>Ad veram sententiam recte intelligendam adhibentur cautiones: prima est de distinguenda vocum similitudine in re dispari:</i></p> <p>XI. <i>Secunda de distinguendo</i></p> | <p><i>jure et modo habendi jus.</i></p> <p>XII. <i>Ostenditur quædam imperia summa haberi plene, id est alienabiliter:</i></p> <p>XIII. <i>Quædam non plene:</i></p> <p>XIV. <i>Quædam non summa plene, id est alienabiliter, haberi.</i></p> <p>XV. <i>Adstruitur dicta distinctio ex discriminando dandi tutoris in regnis.</i></p> <p>XVI. <i>Summam potestatem non tolli promissione etiam ejus, quod nec naturalis, nec divini sit juris.</i></p> <p>XVII. <i>Summum imperium dividi interdum per partes subjectivas aut potentiales.</i></p> <p>XVIII. <i>Male tamen hoc colligi ex eo, quod reges acta quædam sua nisi a cætu aliquo probentur, rata esse nolunt.</i></p> <p>XIX. <i>Alia quoque exempla quædam male huc trahi.</i></p> <p>XX. <i>Vera exempla.</i></p> <p>XXI. <i>Summam potestatem habere posse qui inæquali fœdere teneatur: cum solutione objectionum:</i></p> <p>XXII. <i>Et qui tributum pendat.</i></p> <p>XXIII. <i>Et qui feudis lege teneatur.</i></p> <p>XXIV. <i>Distinctio juris et exercitii cum exemplis.</i></p> |
|---|---|

*Spl. Verbo
Bellum, 1.
D. 1.*

I. 1 **B**ELLI prima maximeque necessaria partitio hæc est, quod bellum aliud est privatum, aliud publicum, aliud mixtum. Publicum bellum est, quod auctore eo geritur,

CHAPTER III. *Division of War into public and private. Explanation of Sovereignty.*

I. 1 The first and most necessary partition of War is this, that War is private, public, or mixt. Public war is that which it carried

qui jurisdictionem habet: privatum, quod aliter: mixtum, quod una ex parte est publicum, ex altera privatum. Sed de privato, quod antiquius, primum videamus.

2 Bellum aliquod privatum licite geri, quantum jus naturæ attinet, satis apparere arbitror ex iis quæ supra diximus, cum ostensum est, ut quis injuriam etiam vi a se arceat, juri naturali non repugnare. Sed forte putet aliquis id saltem post constituta judicia publica non licere: quanquam enim judicia publica non a natura, sed a facto sunt humano, cum tamen multo sit honestius et ad quietem hominum conducibilis, ab eo cujus nihil intersit rem cognosci, quam homines singulos, nimium sæpe amantes sui, quod jus putant id manu exsequi, tam laudabili instituto obsequendum ipsa dictat æquitas et ratio naturalis. Paulus JC: *Non est singulis concedendum quod per magistratum publice possit fieri, ne occasio sit majoris tumultus faciendi. Hinc est, inquit Rex Theodoricus, quod legum reperta est sacra reverentia, ut nihil manu, nihil proprio ageretur impulsu; quid enim a bellica confusione pax tranquilla distat, si per vim litigia terminantur? Et vim vocant leges, quoties quis id, quod deberi sibi putat, non per judicem reposcit.*

*L. Non est
de R. J. 178.*

*Cass. l. iv.
Var. Epist.
10.*

*L. Est. 13.
D. quod
metus.*

II. 1 Certe quin restricta multum sit ea, quæ ante judicia constituta fuerat licentia, dubitari non potest. Est tamen

* *Rex Theodoricus*] Eundem vide in Edicto cap. x. et cxxiv.

on under the authority of him who has jurisdiction; private, that which is not so; mixed, that which is public on one side and private on the other. Let us first speak of private war as the more ancient.

2 That private war may be lawful, so far as Natural Law goes, I conceive is sufficiently apparent from what has been said above, when it was shewn, that for any one to repel injury, even by force, is not repugnant to Natural Law [Chap. II.]. But perhaps some may think that after judicial tribunals have been established, this is no longer lawful: for though public tribunals do not proceed from nature, but from the act of man, yet equity and natural reason dictate to us that we must conform to so laudable an institution; since it is much more decent and more conducive to tranquillity among men, that a matter should be decided by a disinterested judge, than that men, under the influence of self-love, should right themselves according to their notions of right. So Paulus the Jurist, and king Theodoric. [See the passages.]

II. 1 It is not to be doubted, indeed, that the licence which existed before the establishment of public justice is much restricted.

Molin. Disp.
100. § Du-
bium vero.

ubi locum nunc quoque habeat, nimirum ubi cessat iudicium : nam lex vetans sine iudicio suum consequi, intelligi commodè debet, ubi copia est iudicii. Cessat autem iudicium momentanee, aut continue. ^b Momentanee cessat, ubi expectari iudex non potest sine certo periculo aut damno. Continue vero, aut jure, aut facto. Jure, si quis versetur in locis non occupatis, ut mari, solitudine, insulis vacuis, et si qua alia sunt loca, in quibus nulla est civitas : facto, si subditi iudicem non audiant, aut iudex aperte cognitionem rejecerit.

2 Quod diximus etiam post judicia constituta naturali juri non repugnare omne bellum privatum, etiam ex lege Judæis data intelligi potest, ubi sic per Moysen Deus loquitur, Exod. xxii. 2. *Si in effossione deprehensus fur ita percutiatur, ut moriatur, ne reus cædis esto percussor, ni jam dies illuxerit, tunc enim reus cædis erit.* Omnino enim videtur hæc lex, tam accurate distinguens, non solum impunitatem inducere, sed jus etiam naturale explicare ; neque fundari in peculiari aliquo mandato divino, sed in communi sequitate : unde alias etiam gentes id sequutas videmus. Notum est illud XII. Tabu-

^b Momentanee] Servius ad x. *Æneidos* (vers. 419) : *Injecere manum Parce. Traserunt debitum sibi. Et sermone usus est juris : nam manus injectio dicitur, quoties nulla iudicis auctoritate rem*

nobis debitam vindicamus.

^c *Ex veteri jure Attico*] Solonis verba, [apud Demosthen. *Orat. adversus Timocrat.* pag. 476] : *Εἰ μὲν τις μετ' ἡμέραν ὑπὲρ πεντήκοντα δραχμῶν*

Yet still it continues to exist ; namely when public justice ends : for the law which forbids us to seek our own by other than judicial proceedings, must be understood to apply only when judicial aid can be had. Now judicial aid ceases either momentarily or continuously. It ceases momentarily when the judge cannot be waited for without certain danger or loss. It ceases continuously either *de jure* or *de facto* : *de jure*, if any one be in an unsettled place, as at sea, in a desert, in an uninhabited island, or in any other place where there is no political government : *de facto*, if the subjects do not obey the judge, or if the judge openly refuses to take cognizance.

2 What we have said, that even after judicial tribunals are established, all private war is not repugnant to Natural Law, may also be understood from the Jewish Law, in which God thus speaks by Moses, Exod. xxii. 2 : *If a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him : if the sun be risen upon him, there shall blood be shed for him.* For this law, making so nice a distinction, appears not only to give impunity to the slayer, but to explain Natural Law : and not to be founded in any peculiar divine mandate, but in

larum, haud dubie ex veteri jure Attico profectum: *Si nox furtum faxit, si im aliquis occisit, jure cæsus esto.* Sic insons omnium, quos novimus, populorum legibus judicatur, qui adversus aggressorem armis vitam periclitantem defenderit: qui tam manifestus consensus testimonium præbet, nihil in eo esse, quod naturali juri adversetur.

III. 1 De jure divino voluntario perfectiore, Evangelico scilicet, plus est difficultatis. Quin Deus, cui plus juris est in vitam nostram, quam nobis ipsis, potuerit a nobis patientiam eo usque exigere, ut etiam privatim in periculum adducti, occidi deberemus potius quam occidere, ego non dubito. An autem voluerit nos eo usque obstringere, id est quod inquiremus. Solent pro affirmante sententia adferri duo loca, quæ supra adduximus, ad quæstionem generalem: ἐγὼ δὲ λέγω ὑμῖν, μὴ ἀντιστῆναι τῷ πονηρῷ. *Ego autem dico vobis; Ne resistite injuriam facienti.* Matth. v. 39 et Rom. xii. 19. μὴ ἑαυτοὺς ἐκδικοῦντες, ἀγαπητοί, ubi Latina versio habet, *non vos defendentes, charissimi.* Tertius autem locus est in illis Christi verbis ad Petrum: *Repone gladium tuum in va-* Macrob. Saturn. l. 4.

κλέπτοι, ἀπαγωγὴν πρὸς τοὺς ἕνδεκα εἶναι. εἰ δέ τις νυκτὸς ὃ τι οὖν κλέπτη, τοῦτον ἐξεῖναι καὶ ἀποκτεῖναι. *Si quis de die quod plus quinquaginta drachmis valeat, furetur, eum jus sit*

ad undecim viros deduci: quod si quis noctu vel minimum quid furetur, eum liceat vel occidere. Adde quæ secundo, libro infra dicentur, cap. i. § 12.

Matth. xxvi. 52.

common equity; and accordingly we find that other nations have followed the same. The Law of the Twelve Tables is well known, doubtless taken from the old Attic Law: *If a man commits a robbery by night, and if any one kill him, it is justifiable homicide.* And thus by the laws of all nations which we know, he is deemed innocent who defends himself being in peril of life; which manifest consent is a proof that such a course is not at variance with Natural Law.

III. 1 Concerning the more perfect Instituted Divine Law (Chap. i. § xv.), namely the Evangelical Law, there is more difficulty. That God, who has more Right over our lives than we ourselves have, might have demanded from us forbearance to such an extent, that even when brought privately into danger, we should be bound to allow ourselves to be killed rather than kill another, I do not doubt. The question is, whether he did intend to bind us to this. It is usual to adduce for the affirmative two passages which I have already quoted with reference to the general question: *I say unto you that ye resist not evil,* Matth. v. 39, and Rom. xii. 19, *Avenge not yourselves, dearly beloved.* A third passage is those words of Christ to Peter, (Matth. xxvi. 52), *Put up thy*

ginam ; nam quicumque acceperint gladium, gladio peribunt. Addunt his nonnulli Christi exemplum, qui pro inimicis sit mortuus, Rom. v. 8, 10.

2 Neque desunt inter Christianos veteres, qui bella quidem publica non improbaverint, sed defensionem privatam putarint vetitam. Ambrosii loca pro bello supra attulimus. Augustini multo etiam plura sunt et clariora, omnibus nota. At idem Ambrosius dixit: *Et ideo fortasse Petro duos gladios offerenti, Satis, dicit, quasi licuerit usque ad Evangelium, ut sit in lege æquitatis eruditio, in Evangelio veritatis.* Idem alibi: *Christianus, etiamsi in latronem armatum incidat, ferientem referire non potest ; ne, dum salutem defendit, pietatem contamine.* Augustinus vero: *Legem quidem non reprehendo, quæ tales (latrones et alios invasores violentos) permittit interfici, sed quomodo istos qui interficiunt defendam, non invenio.* Et alibi: *De occidendis hominibus ne ab eis quisquam occidatur, non mihi placet consilium, nisi forte sit miles, aut publica functione teneatur, ut non pro se hoc faciat, sed pro aliis, accepta legitima potestate.* Atque

† *Satis apparet*] Adde Consilii Aurelianensis canonem, citatum a Gratiano c. ult. causa XIII. qu. 11.

* *Nobis potius quam aliis consulere*] Cassiodorus de Amicitia, [vel potius Petrus Bleensis, cui liber ille a Viris

sword within the sheath, for all they that take the sword shall perish with the sword. Some add to these the example of Christ, who died for his enemies, Rom. v. 8, 10.

2 Nor are there wanting among the ancient Christians, those who though they did not condemn public wars, thought that private self-defense was forbidden. We have already (Chap. II. § 10, No. 5) adduced the passages of Ambrose in defense of war: there are passages in Augustine more numerous and more clear, known to all. Yet the same Ambrose says, Perhaps when he said to Peter, who offered him two swords, *It is enough ; it was as if he said, that the use of such weapons was lawful till the Gospel: the Law was a teacher of equity, the Gospel, of truth.* And the same writer in another place: *A Christian, if he should come in the way of an armed robber, may not return his blows ; lest in defending his safety he should stain his piety.* And Augustine, *As to the law which permits such (robbers and other violent transgressors) to be put to death, I reprehend it not ; but how I am to defend those who put men to death, I do not see.* And in another place, *As to putting men to death that other men may not be killed by them, I cannot approve of such deeds ; except the agent be a soldier, or a public officer, or do this, not*

idem sensisse Basilium ex secunda ipsius ad Amphilochem Cap. 43. et 55. epistola ^dsatis apparet.

3 Sed opposita sententia sicut receptior est, ita verior nobis videtur, ut talis patientia non sit in obligatione: jubemur enim in evangelio proximum amare juxta nos ipsos, non præ nobis ipsis: imo ubi par malum imminet, non vetamur *nobis potius quam aliis consulere, ut supra ostendimus auctoritate Pauli beneficentiæ regulam explicantis. Instet forte aliquis, et dicat; etiamsi meum bonum præferre possim bono proximi, hoc tamen locum non habere in bonis inæqualibus; quare vitam meam mihi potius deferendam, quam invasor permittatur incidere in perpetuam damnationem. Sed responderi potest, sæpe etiam eum, qui impetitur, opus habere tempore ad pœnitentiam, aut probabiliter ita existimare; et ipsi quoque aggressori ante mortem posse ad pœnitentiam spatium superesse. Deinde morali judicio non videri æstimandum illud periculum, in quod ipsum se quis conjiciat, et unde se potest eximere.

4 Certe Apostolorum aliqui ad ultimum usque tempus, Christo vidente et sciente, videntur iter fecisse armati gladio,

Doctis vindicatur]. Sane nullus aliquo præcepto vel aliqua ratione tenetur salutem animæ proximi perditione animæ suæ,

aut corporis ejus liberationem, citra spem perpetuæ salutis, proprii corporis interitu procurare.

for himself, but for others, having received legitimate authority. And Basil was of the same opinion.

3 But the opposite opinion, as it is the more common, so does it seem to us the more true, that such forbearance is not obligatory: for in the Gospel we are told to love our neighbour as ourselves, but not better than ourselves; nay even, when an equal evil impends over ourselves and another, we are not forbidden to consult our own safety rather than that of others, as we have shewn above from St Paul, when he explains the law of kindness. Perhaps some one may urge in reply, that though I may prefer my own good to the good of my neighbour, this does not hold of unequal goods: and that I must rather give up my life than that the aggressor should be permitted to fall into eternal damnation. But we may answer that the person attacked may also need time for repentance before he dies, or may think so on probable grounds, and that the aggressor may possibly have time for repentance before his death. But in truth we are not to estimate the moral consequences of a danger into which a man throws himself, and from which he can relieve himself.

4 Certainly the Apostles, even to the last, with the knowledge and under the eye of Christ, travelled armed with sword, which also other

Bell. Jud. 11.
12.

quod et alios Galilæos e patria urbem versus properantes ob infestas latronibus vias factitasse ex Josepho discimus: qui et de Essenis innocentissimis hominibus idem prodidit. Hinc enim factum est, ut cum diceret Christus tale tempus imminere, ut gladii comparandi causa vel vestis vendenda esset, Lucæ xxii. 36, statim Apostoli responderint in suo comitatu duos esse gladios: erant autem in eo comitatu nulli præter Apostolos. Tum vero illud ipsum, quod dixit Christus, quamquam præceptum revera non continet, sed proverbium est, significans gravissima pericula imminere, ut clare ostendit oppositio primi temporis, quod tutum ac prosperum fuerat, comitate 35 est tamen tale, ut sumptum appareat ex eo, quod fieri solebat, quodque Apostoli licitum censebant.

*Orat. pro
Milon.* 4.

5 Recte autem a Cicerone dictum est: *Gladios habere certe non liceret, si uti illis nullo pacto liceret.* Illud vero, *Ne resistite injuriam facienti,* non magis universale est quam quod sequitur, *Date omni petenti;* quod tamen exceptionem admittit, dum ne nimium nos prægravemur: imo isti præcepto de dando nihil adjicitur quod vim habeat restringentem, sed ex solo sensu sequitatis adstringitur; cum præceptum de non resistendo suam habeat adjunctam explicationem per exemplum alapæ; ut intelligatur tum demum præcise nos obligare, cum

Galileans, travelling from their country to Jerusalem, did for fear of robbers, as we learn from Josephus; who says also that the Essenes, most blameless men, did the same. Hence when Christ said that a time was at hand such that men should sell a garment to buy a sword, Luke xxii. 36, the Apostles answered that they had two in that company: which company consisted of the Apostles alone. And though what was said by Christ, was in truth, not a command but a proverbial expression, signifying that most grave perils were impending, as clearly appears from the opposition of the former time, which had been safe and prosperous, verse 35, *When I sent you without purse, &c.;* yet it shews what was customary, and what the Apostles thought lawful.

Now it is rightly said by Cicero, that *It would not be lawful to carry a sword if it were not lawful under any circumstances to use it.*

5 The other passage, *Resist not evil,* is more universal than that which follows, *Give to every one that asketh:* which nevertheless admits of exception, namely, that we are not to overburthen ourselves. Nay more: This precept concerning giving has nothing added to it of a restrictive force, but is limited only by the sense of equity: whereas the precept, not to resist, has the explanation added in the example of a buffet on the cheek; that it may be understood to oblige us precisely

ea impetitur injuria, quæ aut alapa sit, aut alapæ par: nam alioqui rectius fuerat dicere, *Ne resistite injuriam facienti, sed vitam profundite potius quam armis utamini.*

6 In verbis ad Romanos, *μὴ ἑαυτοὺς ἐκδικοῦντες*, omnino *ἐκδικεῖν* non tuendi, sed ulciscendi habet significationem: ut et Judith. i. 12, et ii. 1; Luc. xviii. 7, 8; xxi. 22; 2 Thess. i. 8; 1 Petr. ii. 14; Rom. xiii. 4; 1 Thess. iv. 6. Idque ipsa verborum connexio manifeste ostendit: præcesserat enim, *Ne rependatis ulli malum pro malo*: hæc autem est ultionis, non defensionis descriptio. Et monitum suum fulcit Paulus Deuteronomii loco, *ἐμοὶ ἐκδίκησις, ἐγὼ ἀνταποδώσω*, ubi in xxxii. 35. Hebræo est *לִּי נֶקֶם*, quo ultionem significari tum vocis proprietas indicat, tum ipsa loci sententia, quæ defensionem intelligi non patitur.

7 Quod vero Petro dictum est, continet quidem prohibitionem utendi gladio, sed non in defensionis causa, neque enim se opus habebat defendere: jam enim dixerat Christus de discipulis: *Sinite hos abire: idque ut impleretur sermo quem dixerat: Ex iis, quos dedisti mihi, non perdidisti quemquam*, Joan. xviii. 8, 9; neque Christum, nam defendi volebat. Ideo apud Joannem hanc causam interdictioni subjicit, *An non bibam poculum, quod dedit mihi Pater?* com. 11. et

then when we are assailed by an injury such as a buffet, or something of the same kind: for otherwise it would have been more suitable to say, *Resist not an injurious aggressor, but give up your lives rather than use arms.*

6 In the words to the Romans, *Avenge not yourselves*, the Greek word means to *avenge*, not to *defend*. [See the passages.] And this is plain from the context: for he had just said, Rom. xii. 17, *Recompense no man evil for evil*; which is a description of vindictive, not of self-defensive conduct. And Paul supports himself by reference to Deut. xxxii. 35, where the meaning of the word, and the sense of the passage, shews that self-defense cannot be intended.

7 What is said to Peter does contain a prohibition of using the sword, but not in self-defense: for he had no reason to defend himself; since Christ had just said concerning his disciples, *Suffer them to depart*; and that, in order that the words which he had uttered might be fulfilled: *Of those whom thou hast given me I have lost none*: John xviii. 8, 9: nor to defend Christ, for he would not allow himself to be defended. And hence in St John he adds the reason for this prohibition: *The cup which my Father has given me, shall I not drink it?* verse 11; and in Matthew he says, *How then shall the Scriptures be*

xxvi. 54

De Patient.
15.

apud Matthæum ait, *Quomodo ergo implerentur scripturæ, quæ dicunt ita oportere fieri?* Ulciscendi ergo animo Petrus, ut erat fervidus, non defendendi ferebatur: adde quod arma sumebat in eos, qui nomine publicarum potestatum adventabant, quibus an ullo casu resistere liceat, peculiaris est quæstio, infra a nobis peculiariter tractanda. Quod autem adjicit Dominus, *Omnes, qui gladium acceperint, gladio peribunt*, aut proverbium est, ex vulgi usu desumptum, quo significatur sanguinem sanguine elici, ideoque armorum usum periculo nunquam vacare: aut, quæ Origenis, Theophylacti, Titi, et Euthymii sententia est, indicat, non esse quod nos Deo præripiamus ultionem, quam ipse suo tempore satis sit exacturus: plane quo sensu in Apocalypsi dicitur xiii. 10. *Qui gladio occidit, eum gladio occidi oportet: in hoc sita est spes et patientia sanctorum*: quicum convenit Tertulliani illud: *Adeo satis idoneus patientiæ sequester Deus: si injuriam deposueris penes eum, ultor est; si damnum, restitutor est; si dolorem, medicus est; si mortem, resuscitator est: quantum patientiæ licet, ut Deum habeat debitorem?* Simulque his Christi verbis vaticinium videtur inesse de pœnis, quas a sanguinariis Judæis erat exacturus gladius Romanorum.

8 Ad Christi exemplum, qui pro inimicis mortuus dicitur,

fulfilled, which say that so it must be? St Peter then, according to his fervid temper, was moved by the desire of revenge, not of defense. Add to this, that he was using weapons against those who came in the name of the public authorities: and whether these may in any case be resisted, is a peculiar question, to be specially treated hereafter. What the Lord adds, *All they that take the sword shall perish by the sword*, is either a proverb borrowed from common usage, which meant that blood leads to blood, and therefore that the use of arms is always full of peril; or, as is the opinion of Origen, Theophylact, Titus, and Euthemius, it denotes that we are not to take vengeance out of the hands of God, since it is what he will fully exact in his own time: and this is plainly expressed, Revelation xiii. 10, *He that killeth with the sword must be killed with the sword. Here is the patience and the faith of the saints.* And this agrees with what Tertullian says, *So sufficient is God, as one in whom our patience may trust: if we leave our injuries to him, he is our avenger; if our losses, our recompenser; if our pains, our physician; if our death, our restorer to life. What a privilege of patience it is to make God our debtor!* And at the same time the words of Christ seem to contain a prophecy of the punishment which the Roman sword was to exact from the sanguinary Jews.

responderi potest, Christi facta omnia quidem virtutis esse plena, et quæ, quoad ejus fieri potest, imitari laudabile sit, et suo præmio non cariturum; non tamen omnia ejusmodi esse, ut aut ex lege veniant, aut legem faciant. Nam quod Christus pro inimicis atque impiis est mortuus, id non fecit ex lege aliqua, sed ex speciali quasi pacto et fœdere inito cum Patre; qui si id faceret, non modo summam ei gloriam, sed et gentem in æternum duraturam promisit, Esaiæ liii. 10. Alioqui esse hoc factum quasi singulare, et cui vix quicquam reperitur simile, ostendit Paulus Rom. v. 7. Et Christus nos animam nostram periculis objicere jubet, non pro quibusvis, sed pro ejusdem disciplinæ consortibus, 1 Joan. iii. 16.

9 Quæ vero ex Christianis scriptoribus allatæ sunt sententiæ, partim videntur consilium magis, et sublimis propositi commendationem, quam destitutum præceptum continere; partim privatæ sunt ipsorum, non communes totius Ecclesiæ. Nam in canonibus antiquissimis, qui Apostolici dicuntur, communione is demum privatur, qui in rixa primo ictu adversarium occiderit, διὰ τὴν προπέτειαν αὐτοῦ, *ob nimium calorem*. Et hanc sententiam ipse etiam Augustinus, quem

Can. lxiv.

Ob nimium calorem] Ambrosius libro x. in Lucam: O Domine, cur me emere jubes gladium, qui ferire me pro-

hibes? cur haberi præcipis quem velas promi? nisi forte ut sit parata defensio, non ultio necessaria. (Cap. 22).

Vid. etiam c. et vero. de sent. excom. etc. signifi- casti. de homicidio.

8 With regard to the example of Christ, who is alleged to have died for his enemies, it may be answered, that all the acts of Christ are full of virtue, and such as may be laudably imitated, as far as is possible, and will not fail of their reward; but they are not all such as proceed from a law, or make a law for us. For that Christ died for his enemies and for the ungodly, was what he did not in pursuance of any law, but from a special covenant with his Father; who promised, on that condition, not only eternal glory, but also an endless offspring, Isaiah liii. 10. And so Paul describes this as a special and exceptional and unparalleled act, Rom. v. 7: *Scarcely for a righteous man will one die*. And Christ commands us to put our life in peril, not for any one, but for the brethren, 1 John iii. 16.

9 As to the opinions adduced from Christian writers, partly they appear to be rather counsels, and the recommendation of an elevated purpose, partly they are the private opinions of those writers, not the common judgment of the Church. For in the very ancient Canons which are called Apostolic, he especially is excluded from the communion, who in a quarrel had slain his adversary at once, in heat of

in contrariam partem adduximus, probare videtur Quæst. lxxxiv. in Exodum.

IV. 1 Publicum bellum aliud est solenne ex jure gentium, aliud minus solenne. Solenne quod hic voco, plerumque justum dici solet eo sensu, quo justum testamentum codicillis, justæ nuptiæ servili contubernio opponuntur: non quod non liceat et codicillos facere ei qui velit, et servo secum mulierem¹ habere in contubernio; sed quod testamentum et nuptiæ solennes peculiares quosdam ex jure civili effectus habeant: quod notari utile est; multi enim, voce justī male intellecta, damnari putant ut iniqua aut illicita bella omnia, quibus illa justī appellatio non convenit. Ut bellum solenne sit ex jure gentium, duo requiruntur; primum ut geratur utrimque auctore eo, qui summam potestatem habeat in civitate: deinde, ut ritus quidam adsint, de quibus agemus suo loco. Hæc quia conjunctim requiruntur, ideo alterum sine altero non sufficit.

2 Bellum autem publicum minus solenne potest et ritibus illis carere, et geri in privatos, et auctorem habere magistra-

¹ *Habere in contubernio*] Imo inter cives erant quædam matrimonia non justa, non justī liberi. Paul. *Sent.* Lib. II. tit. xix. L. Si uxor. 13. D. ad L. Juliam de Adulteris: sic et libertas quædam non justa. Seneca *De Vita Beata*, c. xxiv. Suetonius *Octavio*, c. xl. [Locus Pauli lecti male hæc addu-

citur, quasi in eo esset exemplum *matrimonii non justī*, eo sensu, quo intelligit Auctor: et ipse infra, in not. ad Lib. II. cap. v. § 15. num. 1. suspicatur, latere additamentum *Aniani*. Sed vide ibi eximium Editorem *Jurisprudentia Antejustinianæ*, Clar. SCHULTINGIUM. Circa *Uxorem injustam*, de qua in L. 13.

blood. And this opinion Augustine, whom we have quoted on the opposite side [§ II. No. 2], appears to approve.

IV. [And now of Public War.] 1 Public War is either formal, according to the Law of Nations, or less formal. What I here call formal, is commonly called legitimate, in that sense in which a legitimate will is opposed to a codicil, and a legitimate marriage, to the cohabitation of slaves: not that a man may not lawfully make codicils, or a slave cohabit with a woman; but because a Will and a Marriage have peculiar effects by the Civil Law, which it is important to note. For many, not understanding the word *legitimate*, think that all wars which are not legitimate are unlawful and unjust. In order that a war may be formal according to the Law of Nations, two things are required; first, that it be carried on on both sides by the authority of those who have a political sovereignty; next, that certain formalities be employed, of which we shall speak in their place. Since both these conditions are requisite, one alone without the other is not sufficient.

2 An informal public war may both want those formalities, and be

tum quemvis. Et sane si citra leges civiles res spectetur, videtur omnis magistratus, sicut ad tuendam plebem sibi creditam, ita ad exercendam jurisdictionem, si vis occurrat, jus habere belli gerendi. Sed quia ex bello tota civitas in periculum venit, ideo ferme omnium populorum legibus cautum est, ne bellum geri possit nisi auctore eo, qui summam in civitate potestatem habeat. Exstat lex talis Platonis ultimo de legibus. Et in Romano jure majestatis teneri dicitur, qui injussu Principis bellum gesserit delectumve habuerit, exercitum comparaverit. Injussu populi dixerat lex Cornelia lata a L. Cornelio Sylla. In Justiniano Codice exstat constitutio Valentiniani, et Valentis; *Nulli prorsus nobis inseciis atque inconsultis quorumlibet armorum movendorum copia tribuatur.* Huc pertinet illud Augustini: *Ordo naturalis mortalium paci accommodatus hoc poscit, ut suscipiendi belli auctoritas atque consilium penes principes sit.*

Pag. 355. n.c.

L. Hi. D. ad
l. Jul. maj.Ut armor.
nullus insecio
Principis, in-
terdictus sit,
Leg. Unie.

3 Sicut autem omnia dicta, quantumvis universalis, æquitatem recipiunt interpretem, ita et hæc lex. Nam primum

Vict. de Jur.
Bell. n. 2.

D. Ad Leg. Jul. de Adult. et alibi, varias Interpretum sententias collegit et expendit CHR. ULRIC. GRUPEN, *De Uxore Romana*, cap. vii. § 9, pag. 338, et seqq. Quod spectat *Libertatem non justam*, consule TORRENTIUM, in locum Suetonii laudatum: JUST. LIPSIUM in Tacit. *Annal.* XIII. 27, et Eruditissimi

NOODTH Comment. in *Digest.* Tom. II. Opp. pag. 21. J. B.

§ Illud Augustini] Lib. XXII. c. lxxiv. contra Faustum: citat. Gratianus c. quid culpatur, 4. causa XXIII. quest. 1. Apud Hebræos bellum omne, quod non speciali Dei jussu suscipitur, vocatur מלחמת דבר bellum potestatum.

made against private persons, and by the authority of any magistrate. And if we look at the matter without reference to civil laws, it would seem that every magistrate has the right of making war, both to protect the subjects committed to his charge, and to exercise his jurisdiction, if opposed by force. But because by war the whole State is brought into danger, therefore it is provided by the laws of almost every nation, that war is not to be made except by the authority of the Sovereign Power. Plato has such a provision in the last book of his *Laws*. And in the Roman Law, he was held guilty of high treason who without the authority of the Sovereign made war, levied troops, or formed an army: the Cornelian law said, without authority of the People. So it is in the Codex of Justinian: and so argues Augustine. [See the text.]

3 But as all precepts, however universal, are to be interpreted according to equity, so is this law. For in the first place, there can be no doubt that he who is at the head of any jurisdiction may, through the officers of his court, compel by force a few contumacious persons

Molin. Disp.
100. § Idem.
Vict. Bart. in
l. ex hoc Jure
D. de Just. et
Jur. Bart.
de Repres. 3.
Principali ad
Secund. u. 6.
Mart. Laud.
de Bell. q. 2.

Livius. xxiv.
30.

quin ei qui jurisdictioni præstet liceat per apparitores suos vi cogere paucos imparentes, ²quoties ad eam rem copiis majoribus opus non est, nec periculum imminet civitati, dubitari nequit. Rursum, si ita præsens sit periculum, ut tempus non ferat eum consuli qui supremum in civitate jus habeat; hic etiam necessitas exceptionem porriget. Hoc jure usus L. Pinarius præsidio Ennæ in Sicilia præfectus, cum certo sciret oppidanos ad Carthaginenses defectionem moliri, cæde in eos facta, Ennam retinuit. Extra talem necessitatem ad vindicandas injurias, quas Rex persequi negligit, jus bellandi oppidanis in civitatibus dare ausus est Franciscus Victoria: sed ejus sententia merito ab aliis repudiatur.

Agala de Jur.
Bell. l. 2. n. 7.
Sil. Verb.
Bell. n. 2. ubi,
sufficit etiam.
Innoc. c. olim
de Rest. Spo.
n. 8. etc.
sicut. de Jure
Jur. n. 5.
Panor. ibid.
Bart. ad l.
Host. D. de
Captiv.

V. 1 At quibus eventibus jus armorum movendorum esse magistratibus minoribus constat, an bellum tale publicum sit dicendum, dissentiunt juris interpretes. Sunt qui aiunt. Sunt qui negant. Sane si publicum non aliud dicimus quam quod fit jure magistratus, dubium non est quin talia bella publica sint, ac proinde qui in tali facti specie magistratibus

² Hinc l. 68. *D. De rei vindicat.* dicitur, eum, qui restituere jussus, Judici non parere, *manu militari, officio Judicis*, cogendum. Qua de re vide Viros Eruditissimos et Juris peritissimos, JAC. GOTHOFREDUM in Cod. Theodos. *L. unic. de Offic. Jud. milit. et*

Ampliss. BYNCKERSHOEK, Observat. III.
14. *J. B.*

³ *Res auferri obsistentibus*] Juriconsultis in hanc rem productis possunt addi *Franc. Aret. cons. xiv. n. 7. Gail. 1. de Pac. publica, c. 11. numer. 20. Cardinalis Tuschus pract. quæst. LV.*

to obey him, when there is no need of major force for the purpose. And again, if the danger be present and pressing, so that there is no time to consult the Sovereign, here also necessity makes an exemption. On the ground of such a right as this, L. Pinarius, the commander of the garrison of Enna, being aware that the townsmen had the intention to revolt and join the Carthaginians, by a sudden onslaught on them kept possession of the town. And even without great necessity, in order to obtain satisfaction for injuries which the king neglects to prosecute, Francis Victoria gave the citizens of towns the right of making war. But this opinion is deservedly repudiated by others.

V. 1 In what events the right of using arms is to be allowed to subordinate magistrates, and whether such a war is to be called a public war, the Jurists differ. Some affirm, some deny. If indeed we call that *public* which is done by the authority of the magistrate, there can be no doubt that such wars are public wars; and that therefore those who in such cases oppose the magistrates, incur the punishment of contumacy against their superiors. But if *public* be taken in a higher

se opponunt, in poenas incidant contumacium adversus supra se positos. Si vero publicum sumitur in excellentiore significato pro eo quod solenne est, ut sæpe sumi extra controversiam est; non sunt bella ista publica, quia ad istius juris plenitudinem, tum iudicium summæ potestatis, tum alia requiruntur. Neque me movet, quod etiam in tali contentione soleant ^hres auferri obsistentibus, ac militibus etiam concedi. Nam id belli solennis non ita proprium est, ut non alibi etiam locum habere possit.

2 Sed et illud accidere potest, ut in imperio late patente ⁱinferiores potestates belli inchoandi concessam habeant potestatem: quod si fit, jam sane censendum erit bellum geri ex vi summæ potestatis: nam quod faciendi quis alii jus dat, ejus ipse auctor censetur.

3 Illud magis controversum, an ubi tale mandatum non est, sufficiat conjectura voluntatis. Mihi id admittendum non videtur. Neque enim hoc sufficit videre, quid hoc rerum statu summam potestatem habenti, si consulatur, placitum

Liv. d. loc.
Pict. n. 9.
Cajet. sec. qu.
40. art. 1.
Silv. Verb.
Bell. p. 1. n. 3.
Loren Dilep.
50. n. 12.

litera B. verbo *Bellum*. numer. 10. Goedæus cons. Marp. XXVIII. numer. 202, et sequentibus.

ⁱ *Inferiores potestates belli gerendi habeant potestatem*] Vide legem Fridrici Imperatoris apud Conradum Abbatem Uspergenssem. [De hac Lege vide

quæ habet J. Hertius, in *Dissert. De superioritate territoriali*, § 81. *Comment. et Opuscul.* Tom. II. p. 266 et seqq. Adde exempla alia, quæ ego adduxi in *Vindictis Juris Societatis Belgicae ad Commercium Indicum*, Gallice scriptis, cap. ult. J. B.]

sense, for that which is formal, as beyond controversy it often is, those are not public wars; for the full right of public war requires both the authority of the Sovereign and other conditions. Nor is this disproved by the fact that in such struggles men have their goods taken from them, and licence is granted to soldiers: for those features are not so peculiar to public war that they may not have place in other cases.

2 But this too may happen; that in an extensive empire, the subordinate powers may have, as a matter conceded to them, the right of making war: and if this be the case, the war must then be considered as made by authority of the Sovereign power; for when a superior gives another the right of doing anything, it is held to be done by the authority of the giver.

3 A more difficult controversy is, whether, when there is no such mandate, a conjecture of the will of the Sovereign be sufficient. To me it seems that this is not to be admitted. For in this state of things, it is not enough to consider, What would be the wish of the Sovereign if he were consulted: but rather this: What the Sovereign, in the

sit: sed hoc magis videndum, quid ille, ubi res moram fert, aut dubiam habet deliberationem, se inconsulto cupiat fieri, si ea de re lex ferenda sit. Nam ut maxime in aliquo facto particulari cesset inspecta particulariter ratio, quæ voluntatem summi imperantis movet, non tamen cessat ratio summa universaliter quæ periculis occurri vult: quod fieri non potest, si ejus rei ad se magistratus quisque judicium trahat.

*Liv. xxxviii.
46, seqq.*

4 Non ergo injuria a legatis suis accusatus fuit Cn. Manlius, quod Pop. Rom. injussu bellum Gallo-Græcis intulisset: nam quanquam in Antiochi exercitu Gallorum legiones fuerant, tamen pace facta cum Antiocho, an ea injuria in Gallo-Græcos exsequenda esset, non in Cn. Manlii, sed in Pop. Rom. arbitrio esse debuit. C. Cæsarem, quod bellum Germanis intulisset, ³dedi Germanis Cato voluit; credo non tam jus respiciens, quam quod imminentis domini metu vellet urbem liberari. Nam Germani Gallos populi Romani hostes adjuverant, ac proinde non erat quod injuriam sibi factam quererentur, si modo justa fuit populi Romani causa in Gallos bellandi.

³ Non ideo Cæsarem dedi Germanis, voluit Cato: sed quod, adversus fidem datam, Germanos prælio laceravisset, eorumque legatos retineri jussisset; ut refert PLUTARCHUS, ex Historicis veteribus

Latino TANNIO GEMINO, *Vit. Cæsar.* Tom. II. p. 718, x. et alibi, pag. 567, b. item APPIANUS, *Excerpt. Legat. Fulv. Ursin.* num. 16, pag. 353, 364. quamquam Cæsar ipse, in *Commentariis* suis,

case when the business admits of delay, or is of doubtful prudence, would wish to be done without consulting him, if a general rule on this subject were to be established. For however in any particular case the reason [for consulting the Sovereign] may seem to vanish on examination, the general rule of not incurring the dangers [which arise from not doing so] does not cease to have weight: and this cannot be done, if every [subordinate] magistrate judges for himself in such cases.

4 [Examples.] Thus Cn. Manlius was rightly accused by his officers of having made war on the Gallo-Grecians without the command of the Roman people: for though there had been legions of those Galli in the army of Antiochus, yet, peace being concluded with Antiochus, the question whether that offence was to be further visited upon the Gallo-Grecians was to be decided by the Roman people, not by Cn. Manlius. [Again] because Cæsar had made war on the Germans, Cato advised that he should be given up to the Germans: but in this, I conceive that he did not think of Right so much as wish the city to be delivered from the fear of a master. For the Germans had assisted the Gauls, the enemies of the Romans, and therefore there was an injury

At Cæsar contentus esse debuit Germanos Gallia mandata sibi provincia pepulisse, nec Germanos, præsertim cum nullum inde periculum immineret, intra suos fines bello persequi, nisi consulto prius populo Romano. Non ergo Germani jus habebant deditionem postulandi, sed populo Romano punire Cæsarem jus erat, plane ut Carthaginenses Romanis responderunt. *Ego non, privato publicone consilio Saguntum oppugnatum sit, quærendum censeo; sed utrum jure an injuria: nostra enim hæc quæstio atque animadversio in civem nostrum est, nostro an suo fecerit arbitrio: vobiscum una disputatio est, licueritne per fœdus fieri.* Liv. xxi. 12.

5 Defendit M. Tullius Cicero factum et Octavii et Decimi Bruti, qui privato consilio in Antonium arma ceperant. Atqui, etiam si constaret meritum hostilia Antonium, Senatus populiq; Romani judicium expectari debuit, an e republica esset dissimulare factum, an ulcisci, ad pacis venire conditiones, an ad arma procurrere. Nam jure suo, quod sæpe cum damni periculo conjunctum est, uti nemo cogitur. Tum

colorem huius perfidiæ querit, *Bell. Gall. Lib. iv. cap. xi. et seqq.* Deinde Auctor noster heic confundit prelium commissum adversus Usipetes et Tencteros, antequam Cæsar primum ponte Rhenum

trajiceret, cum victoria, fere biennio post de *Treviris* relata, et de qua ipse agit, *Bell. Gall. vi. 9.* Plura in *Notis Gallicis* dicamus. *J. B.*

to complain of, if the Romans had just cause for their war against the Gauls. But Cæsar, when he had had Gaul assigned him as a province ought to have been content to expel the Germans from it, and ought not, without having any danger on that side, to have followed the Germans within their own frontier, without first consulting the Roman people. Hence the Germans had not the right of demanding that Cæsar should be surrendered to them, but the Romans had the right of calling Cæsar to account. So the Carthaginians answered the Romans in a similar case; [when Hannibal had besieged Saguntum.] *I do not conceive that the question between us is whether Saguntum was besieged by private or by public authority, but whether the siege was justifiable or not. For it is a question between us and our officer whether he acted by our authority or his own; our dispute with you is, whether the treaty allowed the act.*

5 Cicero defends the act both of Octavius and of Decimus Brutus who of their own motion made war upon Antony. But, even if Antony had deserved to be treated hostilely, the decision of the Senate and the people should have been waited for, whether it was for the interest of the State to overlook the act [of Antony] or to avenge it;

*App. Bell.
Civ. Lib. iv.
p. 327.*

vero etiam, hoste judicato Antonio, permittenda Senatui et populo Romano deliberatio fuit, per quos potissimum bellum id geri vellet. Sic Cassio auxilia ex foedere petenti respondere Rhodii, missuros se, si Senatus juberet.

6 Moniti hoc exemplo, et plura occurrent, meminerimus non omnia probare, quæ a quamvis præclaræ famæ auctoribus dicuntur: sæpe enim tempori, sæpe affectibus serviunt, et aptant τῷ πέτρῳ στάθμην. Quare danda est opera uti in his rebus defecato utamur judicio, nec quæ excusari magis quam laudari possunt, temere in exemplum rapiamus, in quo perniciose errari solet.

7 Cum vero dictum sit, bellum publicum geri non debere, nisi eo auctore, qui summam potestatem habeat, et ad hujus rei, et ad quæstionis illius, quæ est de bello solenni intellectum, atque adeo ad alia multa, necessarium erit, quæ sit summa illa potestas, quique eam habeant, intelligere: eoque magis, quia nostro sæculo viri eruditi, quisque ex usu magis rerum præsentium, quam ex vero illud argumentum exsequuti, rem per se haud expeditam multo impeditiorem reddiderunt.

^k *Magistratibus*] Posset etiam verti *Vectigalibus*, quomodo accepit Thucydidis Schollastes. Est enim vox an-

ceps.

^l *Jus legum condendarum et tollendarum, jus discernendi de bello ac pace*]

to treat for peace, or to rush into arms. For no one is bound to use his Right to his own loss. And if Antony was judged a public enemy, it was for the Senate and people to determine by whom the war was to be conducted. So when Cassius asked the Rhodians for soldiers to help him according to their treaty, they replied that they would send them if the Senate ordered them.

6 Warned by this and other examples, we must recollect not to give our approval to everything which is said by authors, even of great name; for they are often governed by the time, or by partial affections, and stretch their measure to their block. We must endeavour to form a clear and unbiassed judgment, and avoid setting up as examples cases which ought to be excused rather than praised.

7 Since then it is said that a public war must not be carried on except by the authority of the person in whom the Sovereignty resides; it will be necessary, for the understanding of this question, and in order to decide other points concerning war, that we should understand what this Sovereignty is, and who has it; and this all the more, inasmuch as learned men, in our time, arguing the question rather with a view to some present object than according to the truth, have made a subject, in itself not simple, still more entangled.

VI. 1 *Facultas ergo moralis civitatem gubernandi, quæ potestatis civilis vocabulo nuncupari solet, a Thucydide tribus rebus describitur, cum civitatem, quæ vere civitas sit, vocat αὐτόνομον, αὐτόδικον, αὐτοτελῆ, suis utentem legibus, judiciis, magistratibus.* Aristoteles tres facit partes in administranda republica, consultationem de rebus communibus, curam legendorum magistratuum, et judicia: ad primam autem partem refert deliberationem de bello, pace, foederibus faciendis ac dissolvendis, de legibus; addit de morte, exilio, publicatione, et repetundis, hoc est, ut ego interpretor, judicia publica; cum prius judiciorum nomine privata intellexisset. Dionysius Halicarnassensis tria maxime notat, jus magistratuum creandorum, ¹jus legum condendarum et tollendarum, jus decernendi de bello ac pace. Alibi addit quartum, judicia. Rursum, alibi adjicit curationem sacrorum et convocationem comitiorum.

Lib. v. 18.

Polit. Lib. iv. 14.

Lib. iv. 20.

Lib. vii. 56.

Lib. ii. 14.

2 At si quis recte partiri velit, facile quæ huc spectant reperiet omnia; ita ut nihil aut desit, aut redundet. Nam qui civitatem regit, eam partim per se, partim per alios regit. Per se autem versatur aut circa universalialia, aut circa singu-

Servius ad 1. *Æneid.* (vers. 236). *Omni ditione. Rectius omni quam omnis: ut* significet omni potestate, pace, legibus, bello.

VI. [Of Sovereignty.] 1 The Moral Faculty or Attribute of governing a state, which is commonly called the Civil Power, is described in Thucydides by three characters, when he says that a city is αὐτόνομος, αὐτόδικος, αὐτοτελής; has its own laws, tribunals, and magistrates. Aristotle makes three parts of the administration of the State; consultation concerning public affairs, election of magistrates, and administration of justice. To the first part he refers deliberation concerning peace, war, treaties, laws; he adds the infliction of death, or exile, forfeiture, bribery; that is, as I interpret him, public offences, having before spoken of the administration of justice in private cases. Dionysius of Halicarnassus notes three points especially; the Right of creating magistrates, the Right of making and abrogating laws, and the Right of deciding on war and peace: and again in another place he adds the care of sacred things, and the convocation of the assemblies.

2 We may easily divide this subject in such a way that there shall be neither defect nor redundance. He who rules the State serves it partly by himself, partly by others. By himself, he is either employed about general matters, or about particular. He is employed about general matters, in making laws and in rescinding them; both with regard to sacred subjects (so far as the care of those belongs to the

Edic. Nic.
vi. 8.

Ibid.

Ibid.

laria. Circa universalia versatur condendo leges, easque tollendo, tam circa sacra (quatenus eorum cura ad civitatem pertinet) quam circa profana. Ars circa hæc Aristoteli ἀρχιτεκτονική, architectalis. Singularia, circa quæ versatur, sunt aut directe publica, aut privata quidem, sed quatenus ad publicum ordinantur. Directe publica sunt actiones, ut pacis, belli, foederum faciendorum; aut res, ut vectigalia, et si quæ his sunt similia: in quibus comprehenditur et dominium eminens, quod civitas habet in cives, et res civium ad usum publicum. Ars circa hæc Aristoteli nomine generis πολιτική, id est civilis, et βουλευτική, consultatrix. Privata sunt res controversæ inter singulos, quas publica auctoritate dirimi publicæ quietis interest. Ars circa hæc eidem Aristoteli δικαστική, judicialis. Quæ per alterum expediuntur, ea expediuntur aut per magistratus, aut per alios curatores, in quibus sunt et legati. His ergo in rebus consistit potestas civilis.

VII. 1 ⁴Summa autem illa dicitur cujus actus alterius juri non subsunt, ita ut alterius voluntatis humanæ arbitrio irriti possint reddi. Alterius cum dico, ipsum excludo, qui summa potestate utitur; cui voluntatem mutare licet, ^mut et

⁴ Confer PUFENDORF. *De Jure Nat. et Gent.* Lib. VII. cap. vi. J. B.

^m *Ut et successorem*] Cachéranus *Decis. Pedem.* CXXXIX. num. 6.

⁵ Vide infra, Lib. II. cap. ix. § 8. J. B.

⁶ Confer PUFENDORF. *De Jure Nat. et Gent.* Lib. VII. cap. v. § 16, et seqq.

State) and secular. The particular matters about which he is employed are either directly public, or private, but with a reference to the public. Directly public, are public acts, as making war, peace, treaties; or money matters, as taxes and commercial duties and the like; among which is comprehended that *dominium eminens* which the State has for public uses, over its citizens and the property of its citizens. This act is by Aristotle called by the general name πολιτική, that is civil, and βουλευτική, deliberative. Private matters are controversies between individuals which the public interest requires to be settled by public authority. The art which deals with them is called δικαστική, judicial. The part of government which is executed by others, is executed either by magistrates, or by other commissioned persons, among whom are ambassadors. And in these things consists the Civil Power.

VII. 1 That Power is called *Sovereign*, whose acts are not subject to the control of another, so that they can be rendered void by the act of any other human will. When I say *any other*, I exclude the Sovereign himself, who may change his determination, as may his suc-

successorem, qui eodem jure utitur, ac proinde eandem habet potestatem, non aliam. Hæc ergo summa potestas quod subiectum habeat, videamus. Subjectum aliud est commune, aliud proprium: ut visus subjectum commune est corpus, proprium oculus: ita summæ potestatis subjectum commune est civitas, quam perfectum cœtum esse supra diximus.

2 Excludimus ergo populos, qui in alterius populi ditionem concesserunt, quales erant provinciæ Romanorum: hi enim populi non per se civitas sunt, ut nunc quidem eam vocem sumimus, sed membra minus digna magnæ civitatis, quomodo servi membra sunt familiæ. Rursum accidit, ut plurium populorum idem sit caput, qui tamen populi singuli perfectum cœtum constituunt: neque enim ut in naturali corpore non potest caput unum esse plurium corporum, ita in morali quoque corpore; nam ibi eadem persona diversa ratione considerata caput potest esse plurium ac distinctorum corporum. [¶] Cujus rei certum indicium esse potest, quod extincta domo regnatrice imperium ad quemque populum seorsim revertitur. Sic etiam accidere potest, ut plures civitates arctissimo inter se fœdere colligantur, [¶] et faciant σύστημα quoddam, ut Strabo [¶] non uno loco loquitur, neque tamen singulæ desinant statum perfectæ

*Pict. de Jur.
Bell. n. 7.*

ubi fuse de his systematibus civitatum
agit. J. B.

tyonibus, Lib. ix. pag. 420. Ed. Paris.
Casalb. *De Lyciis*, Lib. xiv. pag. 664.

[¶] Vide, exempli gratia, de *Amphic-*

cessor who has the same authority, and therefore the same power, not another power. Let us see then in what *subject* this Sovereign power resides. The subject in which a power resides is either common or special; as the common subject in which the sight resides is the body, but the special subject is the eye. And in like manner the common subject in which the Sovereignty resides is the State, which we have before described as a perfect [independent] community.

2 We exclude therefore peoples which have put themselves in subjection to another people, such as were the provinces of the Romans. Such peoples are not by themselves a State, as we now take that word, but the inferior members of a great State, as servants are members of a family. Again, it sometimes happens that several peoples have the same head, though each of these peoples constitutes a perfect community; for though several bodies cannot have one head in the natural body, they may in the moral body; for there, the same person may be separately regarded as the head in his relation to different bodies. Of which there may be a certain indication in this, that when the reigning house is extinct, the right of government reverts to

Pot. II. 20;
III. 2.

civitatis retinere: quod tum ab aliis, tum ab Aristotele etiam notatum est non uno loco.

3 Subjectum ergo commune summæ potestatis esto civitas, ita ut jam diximus intellecta. Subjectum proprium est persona una pluresve, pro cujusque gentis legibus ac moribus: ἡ πρώτη ἀρχὴ apud Galenum libro sexto de placitis Hippocratis et Platonis.

VIII. 1 Atque hoc loco primum rejicienda est eorum opinio, qui ubique et sine exceptione summam potestatem esse volunt populi, ita ut ei reges, quoties imperio suo male utuntur, et coercere, et punire liceat: quæ sententia quot malis causam dederit, et dare etiamnum possit, penitus animis recepta, nemo sapiens non videt. ⁸Nos his argumentis eam refutamus. Licet homini cuique se in privatam servitutem cui velit addicere, ⁹ut et ex lege Hebræa et Romana apparet: quidni ergo populo sui juris liceat se unicuiquam, aut pluribus ita addicere, ut regendi sui jus in eum plane transcribat, nulla ejus juris parte retenta? Neque dixeris minime id præ-

Esod. xxi. 6.
Instit. de
Jur. Pers.
§ Servi au-
tem 4.
Gell. II. 12.

⁸ De vero statu hujus questionis, et quid circa eam statuendum sit, ut extrema, in quæ plerique Auctores incidunt, vitentur, diximus in Notis Gallicis: vide et quæ dudum scripsimus ad PUFENDORF. *De Jur. Nat. et Gent.* Lib. VII. cap. vi. § 5. not. 2. *J. B.*

⁹ Locum Auli Gellii, in margine positum, quo Auctor noster tacite innuere voluit, apud Græcos olim licuisse quoque singulis se ipsos vendere, emenda-

vimus quoad numerum capitæ, ex *Florentum Sparsione ad Jus Justinian.* p. 14. ed. Amst. Sed et ille male hoc aptatur, ut ad Gellium observavit Gronovius, qui heic silet. Auctor noster aufert ipse alium locum haud dubium, Lib. II. cap. v. § 27. n. 1. *J. B.*

⁸ Sed quid jure fieri possit? Gall. de Arrestis, cap. vi. n. 22, et seqq.

⁹ Aut illa cum his amittenda sunt? Cicero, Lib. III. de Legibus: Est ini-

each people separately. And thus it may happen that several States are combined in a close federal connexion, and make one *System*, and yet each is a separate State. [Strabo, Aristotle.]

3 Therefore the common subject of Sovereignty is the State, understood in the way we have described. The special subject is one or more persons according to the laws and customs of each nation.

VIII. 1 And here we must first reject their opinion who say that the Sovereignty everywhere belongs to the People; so that it has the power of controlling kings, and of punishing them if they abuse their power. What evil this opinion has caused, and may cause, any wise man may see. We refute it with these arguments.

A man may by his own act make himself the slave of any one: as appears by the Hebrew and the Roman law. Why then may not a people do the same, so as to transfer the whole Right of governing it

sumi: non enim jam quærimus, quid in dubio præsumendum sit: ²sed quid jure fieri possit. Frustra quoque afferuntur incommoda quæ hinc sequantur, aut sequi possint, nam qualemcumque formam gubernationis animo finxeris, nunquam incommodis aut periculis carebis. *Aut hæc cum illis sunt habenda, ³aut illa cum his amittenda sunt,* ait comœdia. Terent.
Heaut. II. 3,
84.

2 Sicut autem multa sunt vivendi genera, alterum altero præstantius, et cuique liberum est ex tot generibus id eligere quod ipsi placet: ita et populus eligere potest qualem vult gubernationis formam: neque ex præstantia hujus aut illius formæ, qua de re diversa diversorum sunt judicia, ³sed ex voluntate jus metiendum est.

3 Neque vero non multæ exstare possunt causæ, cur populus jus totum imperandi a se abdicet, aliique tradat, puta quia in periculum vitæ adductus, alia lege, qui se defendat, reperire non potest: aut quia inopia pressus aliter habere non potest copiam, unde se sustentet. Nam si Campani olim necessitate subacti ⁴populo Romano se subjecerunt in hunc

*qua, in omni re accusanda, prætermis-
bonis malorum enumeratio, vitiorumque
selectio. (Cap. 10). Mox: Sed bonum
quod est quasitum in ea, sine isto malo
non haberemus.*

*P Sed ex voluntate jus metiendum
est]* A Carolo Quinto Imperatore eo-
dem tempore Augusta civitas petiit, ne
senatus urbis suæ placita valerent, nisi
assensissent curiarum magistri: Norim-
berga plane contrarium. [Pro Carolo

Quinto Auctor debet dicere Sigis-
mundum Imperatorem: ab illo enim
hæc petita fuisse, Historici tradiderunt;
ut, post WAGENSELIUM, observavit J.
Nicol. Hertius, Tom. II. *Comm. et Opusc.*
seu Diss. *De specialibus Rom. Germ.*
Imperii Rebuspubl. § 23. *J. B.]*

4 Populo Romano se subjecerunt]
Ut Falisci apud Liv. Lib. v. c. 27. Sam-
nites, Lib. IX. c. 42. Sic Epidamnii a
Coreyris deserti Corinthiis se dedide-

to one or more persons? And it is not to the purpose to say that we are not to presume such a fact; for this question is not, what is to be presumed in a case of doubt, but what may lawfully be done. Nor is it to the purpose to allege the inconveniences which follow or may follow from such a course: for whatever form of government you take, you will never escape all inconvenience.

2 But as there are many ways of living, one better than another, and each man is free to choose which of them he pleases; so each nation may choose what form of government it will: and its right in this matter is not to be measured by the excellence of this or that form, concerning which opinions may be various, but by its choice.

3 Nor is it difficult to conceive causes why a people may resign the whole power of its own government, and transfer it to another; as for example, if it be in great peril and cannot find a defender on

Liv. vii. 31. modum: *Populum Campanum, urbemque Capuam, agros, delubra Deum, divina humanaque omnia, in vestram P. C. ditionem dedimus*: et quidam populi, cum ¹Romanorum ditioni subijcere se vellent, ne recepti quidem sunt; quod narrat Appianus: quid obstat quominus et uni homini præpotenti populus aliquis eundem ad modum dedere se possit? Apud Virgilium legimus:

Nec cum se sub leges pacis iniquæ
Tradiderit regno.

Accidere etiam potest, ut paterfamilias latifundia possidens neminem alia lege in suas terras habitantem recipere velit: aut ut quis magnam servorum copiam habens eos manumittat, sub imperii ferendi et census pendendi legibus: quæ suis exemplis non carent. De servis Germanorum apud Tacitum est: *Suam quisque sedem, suos penates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono, injungit, et servus hactenus paret.*

Germ. 25.

Polit. II.

4 Adde quod sicut Aristoteles dixit quosdam homines natura esse servos, id est, ad servitutem aptos; ita et populi quidam eo sunt ingenio, ut regi quam regere norint rectius; quod de se sensisse Cappadoces videntur, qui ob-

Strab. Justin.
xii. Lib.
xxxviii.

runt, ut protegerentur adversus Taulantios et exsules. Thucyd. Lib. 1. c. 25.

¹ *Romanorum ditioni*] Et Venetorum. Bembo, Lib. vi.

² *Sub imperio plane regio satis feliciter vixerunt*] Seneca de Beneficiis, libro II. c. xx. de Bruto locutus: *Mihi, cum vir magnus fuerit in aliis, in hac re videtur vehementer errasse, nec ex insti-*

tutione Stoica se gessisse: qui aut regis nomen extinuit, cum optimus civilis status sub rege justo sit, aut ibi speravit libertatem futuram, ubi tam magnum præmium erat, et imperandi et serviendi: aut existimavit civitatem in priorem formam posse revocari, amissis pristinis moribus: futuramque ibi æqualitatem civilis juris, et statutas suo loco leges, ubi

other conditions: or if it be in want and cannot otherwise obtain sustenance. So the Campanians of old submitted themselves to the Romans, [see the text from Livy] and some peoples, which wished to do so, were not accepted. What then prevents a people from giving itself up to some powerful man in the same manner? Or again, it may happen that a large landowner will not allow persons to dwell on his land on any other condition: or if any one have a large body of slaves, he may manumit them on condition of being his subjects and paying his taxes. So the Germans did. [See the text from Tacitus.]

4 Add to this that, as Aristotle says that some men are slaves by nature, so some nations are more prone to be governed than to govern. So the Cappadocians, when the Romans offered them their liberty, refused it, and declared they could not live without a king.

latæ a Romanis libertati vitam sub rege præstulerunt, negantes vivere se sine rege posse. Sic Philostratus, vita Apollonii, Lib. vii. 3. stultum esse ait, Thraces, Mysos, Getas in libertatem vindicare, qua non gaudeant.

5 Neque vero non aliquos movere poterunt exempla gentium, quæ per sæcula plurima "sub imperio plane regio satis feliciter vixerunt. 'Urbes sub Eumene, ait Livius, nullius Liv. xlii. 5. liberæ civitatis fortunam cum sua mutatam voluisse. Est et interdum is civitatis status, "ut videatur nisi sub libero unius imperio salvus esse non posse; quod de Romana, qualis erat Cæsaris Augusti ætate, multis prudentibus visum est. His ergo similibusque de causis accidere non potest tantum, sed et solet, ut se homines subjiciant imperio alterius ac potestati, quod et Cicero notat Officiorum secundo. Cap. 6.

6 Jam vero bello justo, ut ante diximus, sicut acquiri potest dominium privatum, ita et dominium civile, sive jus regendi non aliunde pendens. Neque vero hæc tantum pro unius imperio, ubi id receptum est, conservando dicta censi debent: nam idem jus eademque ratio est procerum, qui plebe exclusa civitatem regunt. Quid, quod nulla respublica adeo reperta est popularis, in qua non aliqui aut valde inopes aut

viderat tot millia hominum pugnantis, non an servirent, sed utri. Vide et Bizarum *Historia Genuensi*, Lib. xiv. p. 329.

'*Urbes sub Eumene*] Sic multos ex liberis Græciæ civitatibus in Salamina Cypri, quod Evagoræ regnum erat, venisse narrat Isocrates. (Pag. 199 B.)

"*Ut videatur nisi sub libero unius*

imperio salvus esse non posse] Dion apud Philostratum v. cap. xi: *δίδια δὲ μὴ χειροῖσιν ἤδη Ῥωμαῖοι αὐταὶ αἱ τυραννίδες πεποινηκυῖαι, χαλεπὴν ἐργάσονται τὴν μεταβολήν. Μέτuo ne Romani longis dominatibus edomiti nullam jam ferre possint mutationem.* (Cap. 34).

So it was said that it was absurd to give freedom to Thracians, Mysians, Getans, because they had no heart for it.

5 Also many may be moved by the examples of nations which have lived happily for many generations under the rule of kings; as the cities of Asia under Eumenes. And sometimes the condition of the State is such that it cannot be safe except under the rule of one; as many prudent men have thought was the case with the Roman State at the time of Augustus. On these and other accounts, it not only may, but does often happen, that many subject themselves to the rule and power of another.

6 Moreover civil authority, or the right of governing, may also be acquired by legitimate war. And all this applies to a government by a body of Nobles, as well as by a single Ruler: and no State was

externi, tum vero et fœminæ, et adolescentes a deliberationibus publicis arceantur ?

7 Jam vero et *populi quidam alios sub se populos habent, non minus addictos sibi quam si regibus parerent : unde illa interrogatio, *Estne populus Collatinus in sua potestate ?* et Campani cum se Romanis dedidissent, facti dicuntur alienæ potestatis : Acarnania ut et Amphilochia dicuntur fuisse juris Ætolorum : Peræa et Caunus ditionis Rhodiorum : Pydna a Philippo Olynthiis data. Et quæ sub Spartanis fuerant oppida, postquam eorum ditioni exempta sunt, Eleutherolaconum nomen acceperunt. Cotyora urbs dicitur fuisse Sinopensem apud Xenophontem. Nicea Italiæ adjudicata Massiliensibus apud Strabonem, et Insula Pithecusæ Neapolitania. Sic Calatiam oppidum colonis Capuensi, Caudium colonis Beneventanæ adjudicata cum territoriis suis apud Frontinum legimus. Otho provinciæ Bæticiæ Maurorum civitates dono dedit : quod apud Tacitum est. Quæ omnia convelli necesse est, si id re-

Liv. l. 36.

Liv. vii. 31.

Liv. xxvi. 24.
Liv. xxxviii. 3.
Strab. xiv. p. 963.
Diod. Sic. xvi. p. 514.

Pausan. Lacon. iii. 21.

Exp. Cypri, v. 6.
Lib. iv. p. 184.
Id. v. p. 248.

De Colonia, p. 323.

Hist. l. 78.

* *Populi quidam alios sub se populos habent*] Sic Salamis insula Atheniensium juris jam inde a Philæo et Eurysace Ajacis filia, ut Plutarchus (pag. 83) Solone nos docet. Hanc Salaminem Atheniensibus ademit Augustus, ut postea Cephalleniam Adrianus, teste Xiphilino (pag. 264 D). Atarneus ab antiquo Chiorum, teste Herodoto Lib. i. (cap. 160), et Samii multa in continente oppida tenuere, ut Strabo docet Lib. xiv. (pag. 639). Anactorium partim ad Corinthios, partim ad Corcyrenses pertine-

bat, ut Thucydides scribit libro i. (§ 55). In pace cum Ætolis apud Livium : *Oeneade cum urbe agroque, Acarnanum esto.* (Lib. xxxviii. c. 11). Sex oppida Halicarnasso attributa per Alexandrum Magnum, memorat Plinius *Historia Naturalis*, Lib. v. c. 29. Idem libro xxxiii. c. iv, Lindum insulam esse ait Rhodiorum : tantundem de Cauno habes libro xxxv. c. 10. Testatur idem Cicero, (Lib. i. *Epist.* i. c. 11), epistola ad fratrem. Rhodii iisdem, quod Romanos contra Antiochum juvissent,

ever so popular, that some were not excluded from public voting ; as strangers, paupers, women and children.

7 Some peoples have other peoples under them, not less subject than if they were under kings : and thus that interrogation, *Is the Collatine people its own master ?* And the Campanians, when they had given themselves up to the Romans, are spoken of as not being their own masters. Acarnania and Amphilochia are described subjects of the Etolians ; Peræa and Caunus, as dependencies of the Rhodians ; Pydna, as given by Philip to Olynthus. The towns which had been under the Spartans, after they were taken from their rule, had the name of Eleutherolacones, Free Laconians. Cotyora is spoken of by Xenophon as a city of the Sinopians. Nicea in Italy was adjudged to the Massilians, as we read in Strabo, and the island Pithe-

cipimus, jus regendi semper subditum esse eorum iudicio ac voluntati, qui reguntur.

8 At vero esse reges, qui populi etiam universim sumti arbitrio non subsint, tum sacra, tum profana historia testantur. *Si dixeris*, inquit Deus populum Israeliticum alloquens, *Statuam supra me regem*: et ad Samuelem: *Indica eis jus regis, qui regnaturus est super eos*. Hinc rex unctus dicitur super populum, super hereditatem Domini, super Israel: Salomo rex super totum Israel. Sic David Deo gratias agit, quod populum suum ipsi subjecerit. Et Christus: *Reges, inquit, gentium dominantur eis*. Notum illud Horatii (Lib. III. Od. 1):

Regum timendorum in proprios greges,
Reges in ipsos imperium est Jovis.

9 Tres gubernandi formas ita describit Seneca: *Interdum populus est quem timere debeamus: interdum, si ea civitatis disciplina est, ut plurima per senatum transigantur, gra-*

complures urbes dono datas ait Eutropius, libro IV. (cap. 2), nempe Carum et Lyciorum, quæ rursus eis ablatae a Senatu. Utrumque est in Excerptis Polybii. [Cap. 36. Non unum est in hac Nota, ceteroquin supervacanea satis, ἀμάρτημα μνημονικόν. I. *Salaminem Augustus non ademitt Atheniensibus*. Sub horum enim imperio illam fuisse statum sua testatur STRABO, pag. 394. Confudit Auctor *Salaminem* cum *Ægina*; de qua XIPHILINUS ait: Τοὺς δὲ Ἀθηναίους ἐκδύκωσεν, Αἴγιαν ἀφελόμε-

νος. Pag. 76 B. II. Hadrianus non ademitt Cephalleniam iisdem Atheniensibus: quin potius dedit, ut patet ex Xiphilino, quem Auctor laudat: Τὴν τε Κεφαλληνίαν δὸν τοῖς Ἀθηναίοις ἐχαρίσατο. III. Nulla est Insula *Lindus*: sed hæc est urbs Insulae *Rhodi*, ut omnes sciunt. Quum in loco Plinii, XXXIII. 4. hæc verba legantur: *Minervæ templum habet Lindos, insula Rhodiorum, in quo Helena sacravit* etc. Auctor noster videtur, dum festinaret, legisse, *INSULA Rhodiorum*. J. B.]

causa to the Neapolitans. So in Frontinus we read that the town *Calatia* was adjudged to *Capua*, *Caudium* to the colony of *Beneventum*, with their territories. *Otho* gave the cities of the *Mauri* to the province of *Bætica*, as it is recorded in *Tacitus*. All which acts must be rejected, if we are to hold the doctrine that the right of governing is always subject to the judgment and will of those who are governed.

8 That there are Kings who are not subject to the will of the People, even taken in its totality, both sacred and profane history testify. The kings of Israel were appointed by God, and were said to be anointed over the people, over the Lord's inheritance over all Israel. [See the passages quoted O. T.: and also *Horace*.]

9 Seneca described three forms of government;—by the people, by a senate, or by a monarch: [and the latter is considered as absolute.]

Flamin. vii.
p. 382.

Lib. iii. 80.

Orat. Lvi.
p. 565 D.

cap. 5.

III. Pol. xiv.

Inst. de Jur.
Nat. § sed et
quod. 6.
Xiph. Fila
M. Ant. p.
571 D.

Pag. 561 A.

tiosi in ea timentur viri: interdum singuli quibus potestas populi et in populum data est. Tales sunt quos Plutarchus ait, οὐ κατὰ τοὺς νόμους μόνον, ἀλλὰ καὶ τῶν νόμων ἄρχειν, *imperium habere non ex legibus modo, sed et in leges: et apud Herodotum Otanes singulare imperium sic describit: ἀνευθύνως ποιεῖν τὰ βούλεται facere quod quis velit, ita ut alii rationem non reddat.* Dioni quoque Prussæensi regnum definitur: ἐπιτάττειν ἀνυπεύθυνον ὄντα, *ita imperare, ut alii ratio non reddatur: Pausanias Messenicis opponit βασιλείαν ἀρχῇ ὑπευθύνῃ, regnum potestati tali quæ rationem actuum reddere debeat.*

10 Aristoteles reges quosdam esse ait cum eo jure, quod alibi habet ipsa gens in se ac sua. Sic postquam Romani principes imperium vere regium usurpare cœperunt, dicitur populus in eos omne suum imperium et potestatem contulisse, etiam in se, ut interpretatur ¹Theophilus. Hinc illud dictum M. Antonini Philosophi: *Nemo nisi solus Deus judex principis esse potest.* Dion. Lib. liii. de tali principe: αὐτοτελὴς ὄντως καὶ αὐτοκράτωρ, καὶ ἑαυτοῦ, καὶ τῶν νόμων, πάντα τε ὅσα βούλοιο ποιῇ, καὶ πάντ' ὅσα αὐτὸς μὴ βούλοιο μὴ πράττει: *Liber est, sui que ac legum potens, ut et quod vult, faciat, et quod non vult, non faciat.* Tale regnum jam antiquitus erat in Græcia regnum ²Inachidarum Argis:

¹ Non satis recta interpretatio. Vide omnino Clar. ΝΟΟΤΙΩ Observ. Lib. i. cap. iii. ejusdemque egregiam Orationem *De Jure Summi Imperii, et Lege Regia*, quam et nos Gallice versam, Notulisque illustratam, altera vice edidimus, simul cum Oratione ΓΕΩΡΓΙΟΥ *De Lege Regia*, ann. 1714. J. B.

² *Inachidarum*] *Hi sunt τῆς Argis.* Deut.

ii. 10. ex qua origine et τῆς δῆς dea, cui templum Thebis Cadmus dicavit, Græci eam Pallada dixere. Dicuntur Æschylo Inachidæ fuisse Pelasgi, id est, extorres a Syro Ἰβ. Etiam qui Lacedæmonem primi tenuere, Pelasgi erant, unde Abrahamo se cognatos dicebant Lacedæmonii in historia Maccabæica. (Lib. i. cap. 15, vers. 21). Sicut autem Argivi

So Plutarch speaks of those who have authority not only from the laws, but over the laws. Otanes in Herodotus speaks of irresponsible authority. So Dio Prussæensis and Pausanias oppose kingly power to responsible power.

10 Aristotle says that some kings have the power which, in other places, the nation has over itself. So when the Roman rulers had acquired a really royal power, the People is said to have transferred to them all its authority and power. Hence Antoninus said that *God alone is the judge of the Prince*. Dio says, of such a Prince, that *he is free to do and not to do what he pleases*. Such a power was that in

nam in Argiva Tragedia *Supplicibus* sic populus regem affatur apud Æschylum: [v. 370.] Pag. 380.

Σὺ τοι πόλις, σὺ δὲ τὸ δῆμιον,
Πρύτανις ἄκριτος ὦν,
Κρατύνεις βωμὸν ἑστῖαν χθονός,
Μονοψήφοισι νεύμασι σίθεν.

Tu res populi, tuque urbs tota es,
Non judiciis subditus ullis,
Regni solio fultus ut ara,
Unoque regens cuncta arbitrio.

11 Longe aliter quam de Atheniensium republica rex ipse Theseus apud Euripidem loquitur, (*Supplic.* ver. 404, et seqq.)

οὐ γὰρ ἄρχεται
Ἐνὸς πρὸς ἀνδρὸς, ἀλλ' ἐλευθέρα πόλις.
Δῆμος δ' ἀνάσσει διαδοχαῖσιν ἐν μέρει
Ἐνιαυσίαισιν.

Hæc juris sui
Parere domino civitas uni negat:
Rex ipse populus annuas mandat vices
Honoris huic, illive.

Nam Theseus, ut Plutarchus explicat, belli tantum ducem et legum custodem agebat, *cetera par civibus. Hinc factum, ut reges, qui populo subsunt, non nisi improprie reges appel-

vi. thes.
p. 11 A.

reges plenissima vii potestate exemplo Orientis, unde venerant, sic et reges Thebani e Phœnicibus. Apparet id ex Creontis verbis apud Sophoclem, (*Antigon.* vers. 516, et seqq. 681, 682) et fœdalis Thebani *Supplicibus* Euripidis: [vers. 410, 411. Vide etiam Pausan. in *Boeotic.* c. 5. Verum Reges Argivi non ita plena utebantur potestate; ut patet

vel ex loco Pausaniæ, quem Auctor ipse adfert paulo post, *num. seq.* Vid. et Notam Gronovii ad Æschyli verba. *J.B.*]

* *Cetera par civibus*] Thesei filius Demophon in *Heraclicis* Euripidis; (vers. 424, 425):

Οὐ γὰρ τυραννὶς ὥστε βαρβαρὸν εἶναι,
Ἄλλ' ἦν δίκαια δρᾶ, δίκαια τεύεσθαι.
Nec enim potestas barbarum in morem mihi,
Sed justa refero oboequia, dum juste impero.

ancient Greece of the Inachidæ at Argos. [See the Chorus in the *Supplices* of Æschylus.]

11 Very different was the power of the kings at Athens, as Theseus speaks in the *Supplices* of Euripides. [See the passage.] For Theseus, as Plutarch explains, was only a Leader in war, and Guardian of the laws, being in other respects on a level with the citizens. Hence kings who are subject to the people are only improperly called kings. So after Lycurgus, the kings of the Lacedæmonians are said to be kings in name, not in reality, by Polybius, Plutarch, and Cornelius Nepos. And this example was followed in other parts of Greece, as at Argos. [See

Lib. vi. c. 8.
 VII. Cteom.
 p. 806.

Cap. 19.

Quæst. Gr.
 p. 291.
 Pol. III. 16.

Plutarch. de
 Marcell. p.
 312. et Dion.
 Halic. v. 70.
 Lib. II. 18.

Philipp. I. 1.
 I.

lari dicantur. Sic post Lycurgum, magisque post Ephoros constitutos, reges Lacedæmoniorum reges nomine, non re fuisse dicuntur Polybio, Plutarcho, ²Cornelio Nepoti. Quod exemplum secuti et alii in Græcia. Pausanias Corinthiacis: Ἀργεῖοι δὲ ἅτε ἰσηγορίαν καὶ τὸ αὐτόνομον ἀγαπῶντες ἐκ παλαιστάτου, τὰ τῆς ἐξουσίας τῶν βασιλέων εἰς ἐλάχιστον προσήγαγον, ὥς μηδενὶ τῶν Κείσου καὶ τοῖς ἀπογόνους ἢ τὸ ὄνομα λειφθῆναι τῆς βασιλείας μόνον: *Argivi jam olim æqualitatis et libertatis amantes regiam potestatem in minimum redegerunt, ita ut Cisi filiis ac posteris præter nomen regni nihil relinquerent.* Sic et apud Cumæos de regibus judicasse senatum notat Plutarchus. Talia regna negat Aristoteles constituere propriam speciem gubernationis, quia scilicet partem tantum faciunt in republica optimatum aut populi.

12 Quin et in populis qui perpetuo regibus non subsunt exempla videmus ³quasi temporarii regni, quod populo non subsit. Talis erat potestas Amymonum ⁴apud Cnidios, et apud Romanos Dictatorum primis temporibus, cum ad populum provocatio non esset; unde Dictatoris edictum pro numine observatum ait Livius, neque usquam ullum nisi in cura parandi auxilium: Dictatura obsessam vim regis potestatis Cicero.

13 Quæ pro contraria sententia adferuntur argumenta,

² Cornelio Nepoti] Verba ipsius, aut quisquis is est, qui vitas illustres scripsit, in *Agerilao*: (cap. 1). *Ut duos haberent reges nomine magis quam imperio.* Alibi: *Lacedæmoniorum autem Agerilæus nomine, non potestate fuit rex, sicut*

ceteri Spartani. (cap. 21. *De Regib.*)

³ Quasi temporarii regni] Livius Salinator in Censura omnes tribus, excepta una, ærarias fecit, ac sic ostendit jus sibi esse in populum omnem. [Lib. xxix. cap. 37].

the passage from Pausanias.] And so the senate judged of the kings at Cuma, as Plutarch notes. Aristotle denies that such kingly government is a peculiar form of government, since it is only a part in an aristocratical or democratical constitution.

12 Sometimes we find, in peoples not generally governed by kings, examples of a temporary kingly authority, not subject to the people. Such was the authority of the Amymones among the Cnidians, and of the Dictators in the early times of Rome, when there was no appeal to the People: whence Livy says that the edict of the Dictator was obeyed as a divine law, there being no choice but to obey. And Cicero speaks of the Dictature as controlling the regal power.

13 The arguments on the other side [that all kings are responsible to the people] are not difficult to answer: for

ea solvere difficile non est. Nam primum, quod asseverant eum a quo aliquis constituitur esse superiorem constituto, verum dumtaxat est in ea constitutione, cujus effectus perpetuo pendet a voluntate constituentis; non etiam in ea, quæ ab initio est voluntatis, postea vero effectum habet necessitatis: quomodo mulier virum sibi constituit, cui parere semper necesse habet. ^bValentinianus Imperator militibus, qui se Imperatorem fecerant, postulantiibus quod ipsi non probabatur respondit: *Ut me ad imperandum vobis eligeretis, in vestra situm erat potestate, o milites: at postquam me elegistis, quod petitis, in meo est arbitrio, non vestro. Vobis tanquam subditis competit parere, mihi, quæ facienda sunt, cogitare.* Sed nec verum est quod assumitur, omnes reges a populo constitui: quod exemplis patrisfamilias advenas sub obediendi lege acceptantis, et gentium bello devictarum, quæ supra attulimus, satis intelligi potest.

Rossm. Hist.
Ecol. vi. 6.

14 Alterum argumentum sumunt ex dicto Philosophorum, regimen omne eorum qui reguntur, non qui regunt, causa esse comparatum: unde sequi existimant, ex finis nobilitate, eos qui reguntur, superiores esse eo, qui regit. Sed nec illud universaliter verum est, omne regimen ejus qui regitur causa esse comparatum; nam quædam regimina per se sunt regentis causa, ut dominicum; nam servi utilitas ibi extrinseca est et

II.

^a Exemplum male aptatum: patet enim ex verbis Plutarchi, a Gronovio exscriptis, Amnemonas illos non habuisse imperium solummodo temporarium, sed perpetuum, *διὰ βίον*. Hunc quoque errorem a Bodino hausit, qui vel memo-

ria lapsus, vel festinans, apud Plutarchum legerat, *δι' ἔτους*. J. B.

^b *Valentinianus*] Verba ejus sic refert Theodoretus IV. c. vi: *ὁμότερον ἢν αὖ στρατιῶται, βασιλεὺς μὴ ὄντοι, ἐμοὶ δοῦναι τῆς βασιλείας τὰς ἡμέρας*.

(1) First, the assertion that he who constitutes any authority is superior to the person so constituted, is only true in that constitution which depends perpetually on the will of the constituent body: not in that which, though voluntary at first, afterwards becomes compulsory: thus a woman constitutes a person her husband, whom afterwards she is obliged for ever to obey. And in this strain is the speech of Valentinian to his soldiers. [See the passage.]

Nor is it true, as is assumed, that all kings are constituted by the people; which we have already shewn by the example of a landowner accepting tenants on condition of their obeying him; and of nations conquered in war.

14 (2) The other argument is taken from the maxim of the philosophers, that all government exists for the sake of the governed, not

adventitia: sicut medici lucrum ad ipsam medicinam non pertinet. Sunt alia regimina mutuae utilitatis causa, ut maritale. Sic imperia quaedam esse possunt comparata ad regum utilitatem, ut quae victoria parta sunt, et non ideo tyrannica dicenda sunt, cum tyrannis, ut quidem ea vox nunc intelligitur, injustitiam includat. Possunt et quaedam utilitatem respicere tam ejus qui regit, quam ejus qui regitur, ut cum populus impotens sibi tuendo regem potentem imponit. Ceterum non nego in plerisque imperiis respici per se utilitatem eorum qui reguntur: et verum esse quod Cicero post Herodotum, Herodotus post Hesiodum dixit, fruendae justitiae causa reges constitutos. Sed non ideo consequens est, quod illi inferunt, populos rege esse superiores: nam et tutela pupilli causa reperta est, et tamen tutela jus est ac potestas in pupillum. Nec est quod instet aliquis, tutorem, si male rem pupillarem administret, amoveri posse; quare et in rege idem jus esse debere. Nam in tutore hoc procedit, qui superiorem habet; at in imperiis, quia progressus in infinitum non datur, omnino in aliqua aut persona, aut coetu consistendum est, quorum

De Offic. II. 12.
Lib. I. 96, 97.
Theopon. ven.
63 et seqq.

ἐπεὶ δὲ ταύτην ἰδεῖσθην ἐγὼ, ἐμὸν
λοιπὸν οὐχ ὑμέτερον, τὸ περὶ τῶν κοι-
νῶν διασκοπεῖσθαι πραγμάτων. *Ves-*
trum fuit, milites, cum imperator nullus
esset, mihi tradere Imperii hujus habe-
nas. Eas, ex quo adeptus sum, de cetero
non vestrum sed meum dispicere quid
reipublica expediat.

c *Deum de principibus judicare*] Xi-
philinus: (in *Marc. Anton.* p. 271 D.
Ed. H. Steph.) πρὸ γὰρ τοι τῆς αὐταρ-
χίας ὁ θεὸς μόνος κρίνειν δύναται. *De*
summo principatu Deus solus potest ju-
dicare. Vitigis rex apud Cassiodorum:
Causa regia potestatis supernis est ap-
plicanda iudicii, quandoquidem illa e

of the governors; whence they conceive it follows that, the end being more noble than the means, the governed are superior to the governors.

But it is not universally true that all government is for the sake of the governed: for some kinds of government are for the sake of the governor, as that of the master in his family; for there the advantage of the servant is extrinsic and adventitious; as the gain of the physician is extrinsic to the art of medicine. Other kinds of government are for the sake of common utility, as the marital. So some kingly governments may be established for the good of the kings, as those which are won by victory: and these are not therefore to be called tyrannies; since *tyranny*, as we now understand it, implies injustice. Some governments too may have respect to the utility both of the governor and the governed; as when a people in distress places a powerful king over it to defend it.

But I do not deny that in most governments, the good of the

peccata, quia superiorem se judicem non habent, Deus sibi Jer. xxv. 12.
curæ peculiari esse testatur; qui ea aut vindicat, si ita opus
judicet, aut tolerat in pœnam aut explorationem populi.

15 Optime Tacitus: *Quomodo sterilitatem, aut nimios* Hist. iv. 74.
imbres, et cetera naturæ mala, ita luxum vel avaritiam
dominantium tolerate. Vitia erunt donec homines, sed neque
hæc continua, et meliorum interventu pensantur. Et M.
Aurelius magistratus dixit de privatis, principes de magistra-
tibus, Deum de principibus judicare. Insignis est apud Gre-
gorium Turonensem locus, ubi is ipse Episcopus Regem Fran-
corum sic affatur: Si quis de nobis, o Rex, justitiæ tramites
transcendere voluerit, a te corripitur: si vero tu exces-
seris, quis te corripiet? Loquimur enim tibi, sed si volu-
eris, audis: si autem nolueris, quis te damnabit, nisi is,
qui se pronunciavit esse justitiam? Inter Essenorum pla-
cita Porphyrius memorat οὐ δῖχα Θεοῦ περὶ γίνεσθαι τι
τὸ ἀρχεῖν, non obtingere cuiquam imperium ^d*sine Dei cura*
speciali. Irenæus optime: Cujus jussu homines nascuntur,
hujus jussu et reges constituuntur apti iis, qui in illis tem-

Hist. v.
[Vide Corn.
de Boulain-
villiers. Hist.
sacros. regim.
Franc. I. p.
58 sqq.]

De Abetia. iv.
p. 389. [cf.
Joseph. Bell.
Jud. ii. 8, §
7.]
Lib. v. 24.

culo petita est, et soli calo debet inno-
centiam. Apud eundem Cassiodorum
rex: Alteri subdī non possumus, quia
judices non habemus. [Primus locus
CASSIODORI exstat Var. x. 31. sed ibi
leguntur tantum priora verba, non autem
illa, quandoquidem etc. Alter est in
Formula præfectura Urbanae vi. 4.

J. B.]

^d *Sine Dei cura speciali* [Homerus,
[*Iliad.* Lib. i. vers. 197]:

Τῷ δ' ἐκ Διὸς ἔσσι.
Ab Jove summus honos.

Diodorus Siculus, Lib. i. *de Ægyptiis* :
(pag. 57, *Ed. Steph.*) ἀμα μὲν οὐκ ἀνευ
δαίμονιον τινὸς προνοίας νομίζοντες αὐ-

governed is the object; and that, as Hesiod, Herodotus and Cicero say, kings are constituted for the sake of justice. But it does not follow, as our opponents infer, that peoples are superior to kings: for guardianship is for the sake of the ward, and yet the guardian has authority over the ward. And we are not to allow them to urge that if a guardian neglects his duty to his ward, he may be superseded; and that therefore kings may be so. For this is the case with a guardian, because he has a superior, (the State); but in political government, because we cannot have an infinite gradation of superiors, we must stop at some person or body, whose transgressions, having no superior judge, are the province of God; as he himself declares. And he punishes them, if he deem fit to do so; or tolerates them, in order to punish or to try the people.

15 So Tacitus says that the vices of Princes are to be tolerated like bad seasons; and may alternate with better. And M. Aurelius said that the magistrates judge private men; Princes, the magistrates;

LII. vii. 16.

poribus ab ipsis regnantur. Sensus idem in constitutionibus, quæ dicuntur Clementis: τὸν βασιλέα φοβηθήσῃ, εἰδὼς ὅτι τοῦ κυρίου ἐστὶν ἡ χειροτονία, *regem timebis, gnarus a Domino electum.*

1 Reg. xiv. 16.
2 Reg. xvii. 7.

16 Nec obstat his quæ diximus, quod populi interdum puniti leguntur ob regum peccata: non enim id eo evenit, quod populus regem aut non puniret, aut non reprimeret, sed quod vitiis ejus tacite saltem consentiret. Quanquam etiam sine eo Deus summo dominio, quod in vitam necemque singulorum habet, uti potuit in pœnam regis, cujus supplicium est subditis orbari.

IX. 1 Sunt alii qui mutuam quandam subjectionem sibi fingunt, ut populus universus regi recte imperanti parere debeat, rex autem male imperans populo subjiciatur: qui si hoc dicerent, non facienda ob regis imperium ea, quæ manifeste iniqua sunt, verum dicerent, et quod apud omnes bonos confessum est: sed id nullam includit coactionem, aut jus aliquod imperii. Quod si etiam populo alicui propositum fuisset par-

τοὺς τετευχέναι τῆς τῶν ὅλων ἐξουσίας:
Existimant enim non sine divina qua-
dā providentia pervenisse reges ad
summam de omnibus potestatem. Augus-

tinus, Lib. v. *de Civitate Dei*, (cap 21):
Qui Vespasiano vel patri vel filio, su-
avisimis imperatoribus, ipse et Domiti-
ano crudelissimo, et ne per singulos ire

God, Princes. In Gregory of Tours is a passage to the same effect. So the Essenes hold, in Porphyry: Irenæus, and the Clementine Constitutions. [See the text.]

16 Nor is it an objection to this, that peoples are described as being punished for the faults of kings: for that does not happen because the people did not punish the king or control him, but because it consented, at least tacitly, to his transgressions*. Although indeed, God might punish the King by his supreme power without the help of the people.

IX. 1 Some assert that there is a mutual subjection, so that the whole people ought to obey the king when he rules rightly, but when a king rules ill, he is subject to the people. If these reasoners were to say that those things which are manifestly iniquitous are not to be done, though commanded by the king, they would say what is true, and confessed by all good men: but this [resistance or disobedience] does not include any authority, or right of control.

If any people intended to share the power of government with the

* I suppose the opponent would ask, how the people could shew that it did not tacitly consent to the king's transgressions, otherwise than by controlling or punishing him. W. W.

tiri cum rege imperium (qua de re infra dicendum erit aliquid) fines certe potestati utriusque assignari debuissent tales, qui cognosci facile possent ex locorum, personarum, aut negotiorum discrimine.

2 Bonitas autem aut malitia actus, præsertim in civilibus, quæ sæpe obscuram habent disceptationem, apta non sunt ad partes distinguendas: unde summam confusionem sequi necesse est, cognitionem de re eadem pro jure potestatis, obtentu actus boni malive, hinc ad se rege trahente, inde populo: qualem rerum perturbationem introducere nulli, quod sciam, populo in mentem venit.

X. 1 Sublatis opinionibus falsis, restat cautiones adhibeamus aliquas, quæ viam nobis monstrare possint ad recte dijudicandum, cui jus summæ potestatis in gente quaque competat. Prima cautio hæc sit, ne decipiamur ambiguo nominis sono, aut rerum externarum specie. Exempli causa, quam apud Latinos opponi solent principatus et regnum, ut cum Vercingetorigis patrem dicit Cæsar principatum obtinuisse

De Bell. Gall.
vii. 4.

necesse sit, qui Constantino, ipse apostate Juliano, nempe majestatem dedit, quod præcesserat. Vitigis apud Cassiodorum, (Var. x. 31): Omnis provectus,

maxime regius, ad divinitatis munera referendus est. Titi Imperatoris erat dictum: potestates falo dari. [Aur. Victor. Epitom. c. 10].

king, (on which point we shall have something to say hereafter,) such limits ought to be assigned to the power on each side as might easily be recognized by distinctions of places, persons, and matters.

2 But the goodness and badness of an act, [the allegation that the king rules well or ill,] which are often matters of great doubt, especially in political affairs, are not fit marks to make such distinctions. Whence the most extreme confusion must follow, if the king and the people claim cognisance of the same matter by the allegation of good and evil conduct. Such a disturbed state of things no people, so far as I know, ever thought of introducing.

X. 1 Having thus removed the opinions which are false, it remains that we lay down some cautions, which may shew us how to judge rightly in whom the Sovereign authority in each nation resides.

The first caution is this: that we are not to be deceived by ambiguous names or mere external appearances. For example, in the Latin there is a customary opposition of Governor (*Princeps*,) and King; as where Cæsar says that the father of Vincetorex acquired the government of Gaul, but was put to death because he aimed at the kingly power; and where Piso, in Tacitus, says that Germanicus was the son of a Roman governor, not of a Parthian king; and where

Ann. xi. 57. Galliae, sed quod regnum affectaret, interfectum: et cum Piso apud Tacitum, Germanicum dicit principis Romanorum, non Parthorum regis esse filium: et cum Suetonius parum abuisse ait Caligulam, quin speciem principatus in regnum converteret: et cum Velleio Maroboduus dicitur non principatum parentium voluntate constantem, sed vim regiam complexus animo.

Calig. 22.
Lib. ii. 108.

Germ. 11.

Lib. i. 7.

Pollic. xi. 9.
Hist. vi. 40.
Biblioth. xv.
p. 465.
Cap. 56.

Geogr. xiii.
p. 607.

2 Videmus tamen confundi hæc sæpe: nam et Lacedæmonii duces ex Herculis posteritate, postquam Ephoris subiecti fuere, reges dicebantur nihilominus, ut modo vidimus: et veteri Germaniæ reges erant, quos Tacitus præfuisse ait auctoritate suadendi, non potestate jubendi: Et de Evandro rege Livius, rexisse eum auctoritate magis quam imperio: et Suffetem Carthaginiensium Aristoteles et Polybius βασιλέα appellant: ut et Diodorus, quomodo et Hannonem *Carthaginiensium regem dixit Solinus. Et de Scepsi in Troade narrat Strabo, cum, adjunctis in civitatem Milesiis, populari republica uti cepisset, veterum regum posteris nomen mansisse regium, et honoris nonnihil.

3 Contra Romani Imperatores, postquam palam et sine ulla dissimulatione regnum liberrimum tenuerunt, principes ta-

* *Carthaginiensium regem dixit Solinus* [Sic qui vitam scripsit Annibalis: *Ut enim Romæ consules, sic Carthagine quotannis annui bini reges creabantur.*

(Corn. Nepos, c. 7). His improprie dictis regibus accenseri possunt et filii, quibus regium nomen datum a patribus regiam vim retinentibus. Talis is Darius

Suetonius says that Caligula was within a little of converting the office of a Governor into a royal estate; and where in Velleius, Maroboduus is said to have imagined to himself, not a government constituted by the choice of subjects, but royal authority.

2 Yet we often find these two names confounded: for the Lacedæmonian governors of the posterity of Hercules, after they were subjected to the Ephori, were called nevertheless Kings, as we have seen. And in ancient Germany there were Kings whom Tacitus asserts to have held their authority by force of persuasion, not of command: and Livy says that King Evander governed more by personal might than by legal office; and Aristotle and Polybius call the Suffete of the Carthaginians, King; as also Diodorus; so likewise Solinus calls Hanno King of the Carthaginians: and Strabo says of Scepsis in the Troad, when, joining the Milesians, they formed a republic, that the posterity of the old Kings retained the royal name and something of the royal honour.

3 On the other hand, the Roman emperors, when they had acquired unquestioned and unconcealed absolute powers, continued to

men vocabantur. Sed et insignia regiæ majestatis in liberis quibusdam civitatibus tribui principibus solent.

4 Jam vero comitia ordinum, ⁴id est, conventus eorum, qui populum in classes distributum referunt, nimirum, ut Guntherus loquitur,

*Ligur. viii.
ver. 577.*

Prælati, proceres, missisque potentibus urbes :

alibi quidem in hoc serviunt duntaxat, ut sint majus regis consilium, per quod querelæ populi, quæ sæpe in consistorio reticentur, ad regis aures perveniant; cui deinde liberum sit statuere, quod ex usu ipsi videatur: alibi etiam jus habent de actis principis cognoscendi, atque etiam leges præscribendi, quibus princeps teneatur.

5 Sunt multi, qui existimant discrimen summi imperii, aut summo minoris, petendum ex delatione imperii per electionem aut successionem. Nam quæ hoc modo deferuntur imperia, ea summa esse contendunt, non item quæ illo. At hæc universim vera non esse pro certo haberi debet. Nam successio non est titulus imperii, qui imperio formam assignet, sed veteris continuatio. Jus enim ab electione familiæ cœptum succedendo continuatur; quare quantum prima electio tribuit, tantum defert successio. Apud Lacones regnum ad heredes

fuit, quem pater Artaxerxes judicatum interfici jussit. Plutarchus in *Artaxerxe* (pag. 1026).

⁴ Vide PUFENDORF. *De Jur. Nat. et Gent. Lib. viii. cap. vi. § 12. J. B.*

be called *Principes*, not Kings.

Also the ensigns of royal power are assigned to the governor in some cities which are free; [as to the Doge at Venice. *Gronovius.*]

4 The Estates of the Realm, or assemblies which represent the various classes of the community, "Prelates, Nobles, and Burgesses," are sometimes only a Great Council of the King, serving to make him acquainted with the complaints of the people, which are often not urged in the Privy Council; and to enable him to decide what is best on such subjects. But in other places these Estates have the right of taking cognisance of the acts of the Prince, and even of prescribing laws by which he is bound.

5 Many think that the distinction of Sovereignty and subordinate authority is to be found in the difference of succession and election: what comes by succession they hold to be sovereign; not what comes by election. But this is certainly not universally true. For succession is not a charter which determines the force of authority, but a continuation of authority already existing. The authority bestowed by the

transibat, etiam post Ephoros constitutos. Et de tali regno, id est, principatu, est apud Aristotelem: *τούτων τῶν βασιλειῶν αἱ μὲν κατὰ γένος εἰσιν, αἱ δὲ αἰρεταί, quædam sanguinis jure, quædam electione deferuntur*: et Heroicis temporibus ¹pleraque in Græcia regna talia fuisse et ipse notat et Thucydides. Contra Romanum imperium, etiam sublata omni senatus et populi potestate, per electionem conferebatur.

Pol. III. 14.

Lib. I. § 13.

XI. 1 Altera cautio hæc esto. ²Aliud esse de re querere, aliud de modo habendi, quod non in corporalibus tantum, sed et in incorporalibus procedit. Ut enim res est ager, ita et iter, actus, via. Sed hæc alii habent jure pleno proprietatis, alii jure usufructuario, alii jure temporario: ita summum imperium dictator Romanus habebat ³jure temporario: reges ⁴plerique, tam qui primi eliguntur, quam qui electis legitimo ordine succedunt, jure usufructuario: at quidam reges pleno jure proprietatis, ut qui justo bello imperium quæsierunt, ⁵aut in quorum ditionem populus aliquis, majoris mali vitandi causa, ita se dedit, ut nihil exciperetur.

¹ *Pleraque in Græcia regna talia fuisse*] Notatum id et Dionysio Halicarnassensi Libro II. (cap. 12), et Lib. V. (cap. 74).

² *Aliud de re querere, aliud de modo habendi*] Videat cui vacat Carolus Molesmus ad consuetudines Parisienses, Tit. I. § 2, gl. 4. num. 16 et 17.

³ *Jure temporario*] Imperatoris ad tempus facti exemplum habes apud Gregoriam Libri IV. initio. (Pag. 36.

Ed. Colon. Allobr. 1616).

⁴ Posui *plerique*, pro *denique*, quod in omnibus est Edd. Res ipsa postulat hanc emendationem; et oppositio *τοῦ quidam reges*, in sequenti membro. Sic Auctor infra, § 14. *PLERIQUE imperia summa non plene habebantur*. Et alibi: *Reges, quales nunc sunt PLERIQUE, regnum habentes non in patrimonio, sed tamquam in usufructu etc.* Lib. III. cap. 20, § 5. Mirum, ab Auctore tale men-

election of the family is continued by succession: whatever amount of right the first election gives, the succession transmits the same. So the Lacedæmonian kings, though not absolute, were hereditary. The distinction is noted by Aristotle and Thucydides. On the other hand, the Roman empire was absolute, yet elective.

XI. 1 A second caution is this. We must distinguish between what a thing is, and what is the kind of possession of it. A thing is, for example, a piece of land; also, in this sense, a road, an act, a right of way. Now such a thing may be held *pleno jure*, in full right of property; or *jure usufructuario*, as tenant for life; or *jure temporario*, as tenant for a time only. Thus the Roman Dictator held his authority as temporary tenant; most kings, both elected and hereditary, by usufructuary right; but some kings, in full right of property; as those who have acquired their power in a legitimate war, or in whose power any people has put itself absolutely, for some sufficient motive.

2 Neque enim illis assentio, qui dictatori negant fuisse summum imperium, quia perpetuum non erat. Nam rerum moralium natura ex operationibus cognoscitur: quare quæ facultates eisdem effectus habent, eodem nomine nuncupandæ sunt. At Dictator intra tempus suum ¹omnes actus eodem jure exercet, quo rex qui est optimo jure; neque ejus actus ab alio reddi irritus potest. Duratio autem naturam rei non immutat: quanquam si de dignitate quæritur, quæ majestas dici solet, dubium non est, quin ea major sit in eo, cui jus perpetuum datum est, quam cui temporarium; quia ad dignitatem facit habendi modus. Atque idem dictum volo de his, qui antequam reges ad suam tutelam pervenerint, aut dum furore, aut captivitate impediuntur, curatores regni ita constituuntur, ut populo non subsint, neque ante legitimum tempus potestas eorum sit revocabilis.

3 Aliud censendum de his, qui jus acceperunt quovis tempore revocabile, id est precarium, quale olim Vandalorum regnum fuit in Africa, et ^kGothorum in Hispania, ¹cum ipsos

Procopius
Vand. l. 9.
Athen. II. 20.
IV. 35.

dum typhothetarum, vel forte exscriptoris, non fuisse animadversum. *J. B.*

^o Gratis statuitur hec, necessitatem illam per se efficere ut regnum sit in patrimonio Victoris, aut se dedentes accipientis. Re vera nullum omnino Regnum est in patrimonio, nisi ex consensu, expresso vel tacito, Populi. Quæ de re diximus in Notis nostris Gallicis ad hunc locum. *J. B.*

¹ Omnes actus eodem jure exercet]

Adeo quidem ut populus, cum Fabium Rullianum servare vellet, apud dictatorem precibus egerit. [Narrat Livius, Lib. VIII. cap. 29-35].

^k Gothorum regnum in Hispania] Moris antiqui vestigium in Behetris. Vide Marianam, Lib. XVI. (cap. 17).

¹ Cum ipsos deponerent populi quoties displicerent] Hoc de Herulis etiam prodidit Procopius Gothicorum II. (cap. 14, 15) de Longobardis Paulus War-

2 The Dictator was Sovereign, though temporary. For the nature of moral things [such as power] is known from their operations, and those faculties or powers which have the same effect must be called by the same name. Now the Dictator, during his office, performed all the acts which the most absolute king can perform; nor could his acts be rendered void by any one. And the duration of a thing does not alter its nature. If indeed you ask concerning the dignity, the *majesty* of the office, undoubtedly it is greater in a perpetual office. In the same manner those Regents are Sovereigns for the time, who govern during the nonage, insanity, or captivity of the king, and whose power is not revocable before a certain legitimate period.

3 The case is different with governors whose authority may be revoked at any time; as the kings of the Goths and the Vandals. These are not sovereign.

deponerent populi quoties displicerent; horum enim singuli actus irriti possunt reddi ab his, qui potestatem revocabiliter dederunt; ac proinde non idem est effectus, nec jus idem.

XII. 1 Quod autem dixi, quædam imperia esse in pleno jure proprietatis, id est, in patrimonio imperantis, quidam viri eruditi hoc argumento oppugnant, quod liberi homines in commercio non sint. At sicut alia est potestas dominica, alia regia; ita et alia est libertas personalis, alia civilis, alia singulorum, alia universorum. Nam et Stoici quandam servitutem constare dicebant ὑποτάξει, in subjectione: et in sacris literis subjecti regis servi vocantur. Sicut ergo libertas personalis dominium excludit, ita libertas civilis regnum atque aliam quamvis proprie dictam ditionem. Livius ista opponit: *Regem vocabant, libertatis dulcedine nondum experta*. Idem: *Indignum videbatur, populum Romanum servientem, cum sub regibus esset, nullo bello nec ab hostibus ullis obsessum esse; liberum eundem populum ab Hetruscis obsideri*. Et alibi: *Non in regno populum Romanum, sed in libertate esse*. Rursum alio loco ^mopponit gentes, quæ in libertate essent, iis, quæ sub regibus viverent. Cicero dixerat: *Aut exigendi reges non fuerant, aut plebi re, non verbis danda libertas*. Post hos Tacitus: *Urbem Romam ab initio reges habuere: libertatem et consulatum L. Brutus instituit*. Et

Holom. cont.
III. q. 1.

Diog. Laërt.

1 Sam. xxii.
17; 2 Sam.
x. 2; 1 Reg.
ix. 22.

Liv. l. 17.

Lib. II. 12.

Lib. II. 15.

Lib. xiv. 18.

Lib. III. De
Legibus, 10.

Ann. l. 1.

nafredi Libro iv. et vi. de Burgundis Ammianus, Libro xxviii. (cap. 5. Ed. Vales. Gron.) de Moldavia Laonicus Chalcocondylas: de rege Agadis apud Afros Johannes Leo Libro vii. (pag. 651. Ed. Elzevir.) de Norwagis ait Guilielmus Neubrigensis regem ibi factum, quisquis regem occidisset: de Quadis et Jasygibus similia habes in excerptis Dionis. [e Theodosio, in Vit. Marci

Antonini.]

^m Opponit gentes, quæ in libertate essent; iis, quæ sub regibus viverent] Thucydides: [Lib. II. §. 29.] δ δὲ Τήρης οὗτος ὁ τοῦ Σιτάλκου πατήρ πρῶτος Ὀδρύσαις τὴν μεγάλην βασιλείαν ἐπὶ πλεόν τῆς ἄλλης Θράκης ἐποίησε· πολὺ γὰρ μέρος καὶ αὐτόνομόν ἐστι Θρακῶν. Hic Teres Sitalcis pater primus Odrysarum regnum ita

XII. [There are monarchies *pleno jure*.]

1 Some oppose this, because, they say, men are not things, and cannot be possessed *pleno jure*, as things. But personal liberty is one thing, civil liberty, another. Men may have personal liberty, so as not to be slaves; and yet not have civil liberty, so as to be free citizens. *Libertas* and *regnum* are constantly opposed in the Roman writers. [See the passages.] The question is not concerning the liberty of individuals, but of a people: and a people which is not thus free, is said to be *non sui juris*, *non suæ potestatis*. [See the passages.]

alibi: *Acrior Arsacis regno Germanorum libertas*. Arrianus De Moribus Germ. Cap. 11.
 Indicis: Βασιλεῦσι καὶ τῇσι πόλεσιν ὅσαι αὐτόνομοι. *Regibus et civitatibus liberis*. Cæsina apud Senecam: *Regalia fulmina sunt quorum vi tangitur vel comitium, vel principalia urbis liberæ loca*; ² *quorum significatio regnum civitati minatur*. Sic Cilicum illi, qui regibus non parebant, Eleutherocilices nuncupati. De Amiso Strabo, modo liberam fuisse, modo sub regibus. Et passim in legibus Romanis de bello, et de judiciis recuperatoriis, externi distinguuntur in reges et populos liberos. Hic ergo non de hominum singulorum, sed de populi libertate quaeritur. Quin et sicut ob privatam, ita ob hanc publicam subjectionem, aliqui dicuntur esse non sui juris, non suæ potestatis. Hinc illa: *Quæ urbes, qui agri, qui homines Ætolorum juris aliquando fuerunt*: *Et, Estne populus Collatinus in sua potestate?* Liv. xxxviii. 11. Idem, l. 38.

2 Proprie tamen cum populus alienatur, non ipsi homines alienantur, sed jus perpetuum eos regendi, qua populus sunt. Sic cum uni liberorum patroni libertus assignatur, non hominis liberi fit alienatio, sed jus quod in hominem competit transcribitur.

3 Neque illud magis firmum est, quod aiunt; si quos populos rex bello quaesierit, cum eos non sine civium sanguine ac sudore quaesierit, civibus quaesitos potius credi debere quam

auxit, ut ceteros Thracia reges superaret: est enim pars etiam Thracum libera. Seneca pater suasoria prima: *Non eodem modo in libera civitate dicendam esse sententiam, quo apud reges*. Josephus *Antiquæ Historiæ*, Libro xiii. *πρὸς βασιλεῖς καὶ δημοὺς ἐλευθέρους*. (Cap. ix. § 2). *Ad reges populosque liberos*. Cicero, *Epistolarum* xv. 4. *Populorum liberorum, regumque so-*

ciorum auxilia. Plinius Libro vi. cap. xx. *de Indis: Jam hi montium, qui perpetuo tractu Oceani oram tenent, liberi et regum expertes*. [*Oceani oræ prætenti legitur in Edit. Hard. § 23, pag. 321, Tom. i. Ed. in fol.*]

² *Quorum significatio regnum civitati minatur*] Vide exemplum talis ostent[is] apud Bizarum libro xix. *Historiæ Genuensis*.

2 When a people is transferred from one Sovereign to another, it is properly, not the persons, but the right of governing them, which is transferred; as a freedman (*libertus*) may be assigned by his patron to one of his sons.

3 Again, they object that if the king has conquered another nation [and so made them his, *pleno jure*,] he has won them by the dangers and labours of his citizens, and therefore the acquisition is theirs. But this will not hold. For the king may have supported the army out of his own property or patrimony. For though he has only the usufruct

regi. ⁷ Nam et fieri potuit, ut rex ^o ex sua privata substantia exercitum aluerit, aut etiam ^p ex fructibus ejus patrimonii quod principatum sequitur. Nam ut in ipsum illud patrimonium rex aliquis non nisi usumfructum habeat, perinde ut in ipsum jus imperandi populo, qui se elegit, fructus tamen ipsius sunt proprii; sicut in jure civili est proditum, hereditatis quæ restitui jussa est fructus non restitui, quia non hereditati accepto feruntur, sed rei. Evenire ergo potest, ut rex ^q in quosdam populos imperium habeat proprio jure; ita ut alienare etiam possit. Strabo Cytheram insulam Tænaro objacentem fuisse ait Euryclis Lacedæmoniorum principis *ἐν μέλει κτήσσεως ἰδίας, privato ipsius jure*. Sic rex Solomo regi Phœnicum Hieromo (ita enim eum Græce vocat Philo Byblius, qui Sanchuniatonis historiam vertit) dedit urbes viginti: non ex uribus populi Hebræi: nam Cabul (quod nomen illis urbibus datum est) ponitur extra fines Hebræorum, Jos. xix. 27, sed ex iis urbibus, quas populi devicti hostes Hebræorum ad eum diem retinuerant, quasque partim rex Ægypti Solomonis socer vicerat, et Solomoni dotales dederat, partim subegerat

Lib. xviii. de
fidei Commis-
saria. § Quo-
tiens 2. D.
ad 30. Tre-
bellian.

Lib. viii. p.
363.

1 Reg. ix. 11,
12.

⁷ Neque objectio, neque responsio Auctoris, satisfaciunt ad probandum, quod uterque intendit. Inde enim tantum sequitur, regnum, de quo agitur, Civibus potius quam Regi, aut Regi potius quam Civibus, quesitum fuisse: quo autem jure, ususfructus an patrimonii, alia est questio, de qua monuimus supra, ad § 11, num. 1. J. B.

^o *Ex sua privata substantia*] M. Antoninus ad bellum Marcomanicum cum serario exhausto indicare populo nihil vellet, facta in foro Trajani auctione, distraxit vasa aurea, pocula crystallina ac murrina, uxoris et suam sericam et auream vestem, multa ornamenta gemmarum. [Vide CAPITOLIN. Vit. Anton. Philos. cap. 17. EUTROPIUM, Lib. viii. cap. 6. AUL. VICTOR. Epit. cap. 16. J. B.]

^p *Ex fructibus ejus patrimonii*] Ideo Ferdinandus Granatenasis regni partem alteram, ut stante matrimonio ex Castellis proventibus quesitam, sibi vindicavit. Docet Mariana Lib. xxviii. *Historia Hispanica*.

^q *In quosdam populos imperium habeat proprio jure*] Balduino concessere, qui cum ipso in orientem belli causa venerant, ut urbium, provinciarum, vexitigalium, rerum bello captarum dimidium ipsi cederet.

^r *Hercules*] Idem Hercules Dryopes, qui juxta Parnassum habitabant, a se vietos donavit Apollini. Servius ad iv. *Æneidos* (vers. 146). Herculeum adversus Lapithas belli socium sibi sumpsit Ægimius Doriensium rex, parte regni in mercedem societatis data. (*Apollod.* II. 7. 7). Cychreus Salaminis rex prole

of his patrimony, he may do what he likes with that. So in the Civil Law, when a property is adjudged from a tenant to the heir, the yearly fruit is not refunded, because that belongs not to the heir, but to the property.

A king then may have authority over a people *proprio jure*, so that

ipse Solomo. Nam eo tempore ab Israelitis non habitatas argumento est, quod postquam Hieromus eas reddidit, tum 2 Par. viii. 2. demum Solomo eo deduxit Hebræorum colonias.

4 Sic ¹Hercules legitur Spartæ bello captæ imperium Tyndareo dedisse hac lege, ut si quos ipse Hercules liberos relinqueret, iis restitueretur. Amphipolis in dotem data Acamanti ²Thesei filio. Et apud Homerum Agamemnon septem urbes se Achilli daturum pollicetur. ³Melampodi partes regni duas dono dedit rex Anaxagoras. De Dario sic Justinus: *Regnum Artaxerxi, Cyro civitates, quarum præfectus erat, testamento legavit.* Sic ⁴Alexandri successores in jus illud plenum ac proprietatem imperandi populis, qui sub Persis fuerant, pro sua quisque parte successisse, aut etiam ipsi victoriæ jure id imperium sibi quæsisisse censendi sunt: quare non est mirandum, si alienandi jus sibi arrogarunt.

5 Sic cum ⁵Attalus rex Eumenis filius populum Romanum testamento bonorum suorum heredem fecisset, populus Romanus sub bonorum nomine etiam regnum complexus est. Florus de ea re: *Adita igitur hereditate provinciam*

carens regnum testamento reliquit Tencro. [Immo Telamoni. Idem, III. ii. 7.] Peleus ab Eurytione Phthiæ rege tertiam regni partem accepit in dotem (III. 12. 1.) quæ habet Apollodorus: apud Livium est Lib. 1: *Proca Numitori regnum legat.* (Cap. 3.)

⁶Habet hoc Auctor ex DEMOSTHENE, in Oratione *De male obita Legatione*: "Ὡς [Θησέως παῖδων] Ἀκάμας λέγεται φέρειν ἐπὶ τῇ γυναικὶ λαβεῖν τὴν χώραν ταύτην [Ἀμφιπόλεως] pag. 251, A. *Ed. Bas. J. B.*

⁷Melampodi] Vide Servium ad sextam *Eclogam*: [vers. 48. et Pausan. Coriath. c. 18] sic apud Homerum Iobates Bellerophonti dat filiam: Δῶκε δὲ οἱ τιμῆς βασιλῆϊδος ἡμῖν πύσχη. Quod Servius sic interpretatur (*Iliad.* vi. 193), ad Virgilium (*Æn.* v. 118)

filiam suam ei cum parte regni in matrimonium dedit. Phoenix de Peleo (*Iliad.* ix. 479):

πολὺν δὲ μοι ἔπαυσε λαόν·
Ναῖον δ' ἱσχυιὴν Θέτης, Δολόπρην ἀνδρῶν
Populos dedit hic mihi multos,
Ut fines Phthiæ, Dolopum quæ regna, tenerem.
Lanassa nubens Pyrrho Epirotarum regi in dotem ei attulit Corcyram urbem, ab Agathocle patre suo bello captam. Plutarchus Pyrrho, (Pag. 387).

⁸Alexandri successores] Ammianus de Perside, non exacte tamen ad historiam fidem: *Ex testamento nationem omnem in successoris unius jura translata.* libro xxiii. (cap. vi. pag. 398. *Ed. Vales. Gronov.*)

⁹Attalus rex] Valerius Maximus: *Attalus testamenti æquitate gratus Asian populo Romano legavit.* Lib. v. cap. ii.

he can even alienate the kingdom to another. This has even been done: as by Solomon to Hiram (or Hierom) king of Tyre.

4 And often in Grecian history. [See the examples.]

5 And in Roman history. Attalus left his kingdom, Asia, to the Romans by will: so did Nicomedes, Bithynia; so did Appion, Cyrenaica.

populus Romanus, non quidem bello nec armis, sed, quod est æquius, testamenti jure retinebat. Et postea cum ²Nicomedes Bithyniæ rex moriens populum Romanum fecisset heredem, regnum in provinciam formam redactum est. Cicero secunda in Rullum: *Hereditatem crevimus, regnum Bithyniæ.* Sic Libyæ pars ³Cyrenaica eidem populo ab Appione rege testamento relicta.

Cap. 15.

Cap. 18. vide et *Epit. Liv.* 43.

Orat. ii. 16.

Just. xxxviii. 2.

6 Tacitus Annalium xiv. agrorum meminit, qui regis ²Apionis quondam habiti, et populo Romano cum regno relict. Cicero de lege Agraria: *Quis ignorat, regnum Ægypti, testamento regis Alexandrini, populi Romani esse factum?* Mithridates in oratione apud Justinum de Paphlagonia loquens: *Quæ non vi, non armis, sed adoptione*

Extern. 3.) Sertorius ea de re apud Plutarchum: τῷ δικαιωτάτῳ τρόπῳ Ῥωμαίων κεκτημένον ἐπαρχίαν. Cum populus Romanus optimo jure eam terram teneret. (Pag. 580, z. Tom. 1. *Ed. Weck.*)

² *Nicomedes*] Vide Appianum Mithridatico et civili primo. (Pag. 218, et 420).

³ *Cyrenaica*] In qua urbes Berenice, Ptolemais, Cyrene. Eutropius vi. (Cap. 9).

² *Apionis*] Appianus Mithridatico: (in fin.) Κυρήνην αὐτῆν Ἀπίων βασιλεὺς τοῦ Λαγνηῶν γένους νόθος ἐν διαθήκαις ἀπέλειπεν: Cyrenen testamento reliquit Apion nothus e Lagidarum genere. Ammianus, Lib. xxii. (cap. 16); Aridiorem Libyam supremo Apionis regis consecutus sumus arbitrio: Cyrenas cum residuis civitatibus Libyæ Pentapoleos Ptolomæi liberalitate suscepimus. Rex enim Cyrenarum et Apio, et Ptolemæus dicebatur: vide breviarum Livii Lib. lxx. Ipse hic Apio Cyrenarum hoc regnum patris testamento acceperat, auctore Justino Lib. xxxix. (c. 5). Alterius Apionis, cujus Ammianus meminit, qui aridam Libyam populo Romano reliquerit, mentio in chronico Eusebiano

ad annum cIo Io cccclii. Adde quod in ædificiis narrat Procopius, (Lib. iii. c. 1), Arsacis regis testamento ita divisam Armeniam, ut major pars Arsaci, minor Tigrani cederet. Ex Josepho discimus, Herodem, Augusto ei concedente ut regnum cui e liberis vellet relinqueret, testamentum aliquoties mutasse, *Antiquæ Historiæ*, Lib. xv. et xvi. Mos hic etiam Gothis et Vandalis in iis, quæ armorum jure tenebant. Gizerichus Vandalus de Hispania testamentum fecit. Procopius Vandalicorum i. (cap. 7). Theudericus Lilybæum in Sicilia dotem dat sorori Amalefridæ. Procopius ibidem. Sed et aliis gentibus. Aquitaniam bello quæsitam Pipinus inter liberos divisit: Fredegarius fine Chronici. De Burgundia testamento relicta vide Aimoinum iii. 68 et 75. Fessæ rex Fessam secundo filio legat. Leo Afer libro iii. quem et de *Bugia* vide libro quinto. (pag. 531). Sultanus Aladinus Osmani plurimas legavit civitates. Leunclavius *Turcice Historiæ* libro ii. Germeanoglius rex cum filia sua, Bajazeti nuptura, dedit Phrygiæ urbes. Idem Leunclavius libro v. *Regnum Turcorum in Cappadocia Musal* [vel Masut] in liberos distribuit. Nicetas libro iii.

6 [Other examples.]

XIII. 1 Some sovereignties are not held *pleno jure*: namely, those which are bestowed by the will of the people. In this case, the king is not to be presumed to have the right of alienation. So Crantzius

testamenti patri suo obvenisset. Narrat idem ab Orode Parthorum rege diu dubitatum, quem filiorum suorum post se regem destinaret. Et Polemo Tibarenorum adsitæque regionis dynasta uxorem reliquit imperii heredem: quod et in Caria olim fecerat Mausolus fratres habens superstites.

Lib. xlii. 4.

Strabo, xli. p. 156.

Idem, xiv. p. 656.

XIII. 1 At in regnis, quæ populi voluntate delata sunt, concedo ^anon esse præsumendum eam fuisse populi voluntatem, ut alienatio imperii sui Regi permitteretur. Quare quod Crantzius ut rem novam notat in Unguino, quod is Norvagian testamentum reliquisset, non est quod improbemus, si Germanorum mores respicit, apud quos regna eo jure minime habebantur. Nam quod ⁹Carolus Magnus, et Ludovicus Pius, et alii postea etiam apud Vandalos et Hungaros

Lib. li. Dan. 4.

(cap. 6.) Urbes ad Pontum Euxinum a Chuscino Bega Murati traditas. Leunclavius libro i. Bajazetes Stephano urbes dedit Servis in honorem uxoris suæ, quæ Stephani soror. Idem Lib. vii. Mahumetes Sultanus Murati testamento regnum reliquit. Idem libro xii. Jacupus Begus Germeanoglius ditionis suæ heredem fecit Muratem Sultanum. Idem libro xiv. Mahumetes Turca filiis duobus, Amurati Europæ, Mustafæ Asiæ imperium relinquere cogitavit: est id apud Chalcocondylam Lib. iv. Basilii Porphyrogenetus Imperator a Davide Curopalate heres institutus ejus regionis, quam David ille in Iberia tenuerat. Narrat Zonaras. (Lib. xvii. cap. 7.) Venio ad Christianos in Oriente victores. Thessaliam Michael Despota inter liberos divisit. Habet id Gregoras Lib. iv. (pag. 52. *Ed. Genev.* 1616). Ætolis Princeps Venetis Athenas reliquit, Boeotiam Antonio vendidit. Chalcocondylas libro iv. Messena, Ithomæ, et Arcadiæ maritimæ ab Arcadio principe filiis data in dotem, cum ea Thomæ Imperatoris Græci filio nuberet. Idem libro v. Acarnania inter nothos Caroli principis testamento ipsius divisa: partes de Ætolia cognatis datæ: narrante eo quem dixi

Chalcocondyla. Sic et regna Hierosolymorum et Cypri partim testamentis legata, partim transcripta contractibus: vide de Cypro Bembus Italicorum vii. et Parutam libro primo. Genuatibus in Sardinia Castrum oppidum donatum, alia Calaritanæ ditionis, donata. Bizarus de Bello Pisano libro ii. Robertus filio minori Boëmundo dedit Dyrrachium et Aulonem. Anna Comnena Lib. v. (cap. 2.) Alfonsus Arragonius Neapoleos regnum, ut armis partum, Ferdinando notho suo reliquit. [Mariana, *Hist. Hisp.* Lib. xxii. cap. 18.] In eodem regno urbes quasdam Ferdinandus legavit nepoti. Mariana libro xxx. (Cap. 27. *seu ultimo.*)

^a *Non esse præsumendum eam fuisse populi voluntatem, ut alienatio imperii sui regi permitteretur* Imperium non debere relinqui ut agros et servos dicit Vespicius Tacito. (Cap. 6.) Salvianus: *Non poterat populos, quos regebat, per testamentum egenis tradere.* [Locus exstat Lib. i. *Adversus Avaritiam*, cap. 12. *Edit. Baluz.* sed qui forte non admodum adpositus est. *J. B.*]

⁹ Vide *Vitam Caroli Magni* ab EGINHARTO scriptam, cap. 30. ibique Notas nuperæ Editionis. *J. B.*

notes, as a thing without precedent, Unguin giving Norway by testament. The bequests of kingdoms by Charlemagne, Louis, and others, were to be taken rather as a commendation than an alienation: and

L.b. xl. 56.

de regnis testati leguntur, ^bid commendationis magis vim apud populum habebat, quam veræ alienationis. Atque id de Carolo speciatim Ado memorat, voluisse eum testamentum suum a Francorum optimatibus confirmari. Simile est quod apud Livium legimus, Regem Macedonum Philippum, cum Persæ a regno arcere, et ejus loco regem facere vellet Antigonom, fratris sui filium, obîisse Macedoniæ urbes, ^cut principibus Antigonom commendaret.

2 Nec quod idem ille Ludovicus urbem Romam Paschali Pontifici reddidisse ¹legitur, ad rem facit, cum Franci imperium in urbem Romam a populo Romano acceptum, reddere ²eidem populo recte potuerint: cujus populi quasi personam sustinebat is, qui primi ordinis princeps erat.

XIV. Quod autem huc usque monuimus, distinguendam esse summitatem imperii ab habendi plenitudine, adeo verum est, ut non modo pleraque imperia summa non plene habeantur, sed et multa non summa habeantur plene: quo fit ut ^dmarchionatus et comitatus facilius quam regna vendi et testamento relinqui soleant.

^b *Id commendationis magis vim apud populum habebat*] Vide Capitulum XII. conventus ad Carisiacum sub Carolo Calvo. Huc refer testamentum Pelagii, quo Hispaniam reliquit Alfonso et Ormisinda, [apud Marianam, *Rer. Hisp.* Lib. VII. cap. 8] et de Dania quædam apud Saxonem. Neque mirum igitur, quædam testamenta improbante populo fuisse irrita, ut Alfonsi Arragonii. Vide Marianam libro X. (cap. 15, 16.) Et Alfonsi Legionensis, cum is filias filio prætulisset. Idem Mariana libro XII. (Cap. 15).

^c *Ut principibus Antigonom com-*

mendaret] Vide rem similem apud Casiodorum Lib. VIII. epist. III. et sequentibus. Ita pacta successionis mutus inter Sanctium et Jacobum Arragonenses a proceribus firmata. Mariana libro XII. (cap. 16) et Henrici Navarrae regis [testamentum, quo] Johannam instituit heredem. Idem Mariana libro XIII. (cap. 22) et Isabellæ reginæ Castellæ. Idem libro XXVIII. (cap. 11, 12.)

¹ Præter ea, quæ bene observavit Gronovius, non potest dici Ludovicus Pius reddidisse, quod numquam Pontifices Romani habuerant, jure scilicet imperii summi, de quo agitur. Diximus

accordingly Charlemagne desired to have his testament confirmed by the Frankish nobles. So Philip, king of Macedon, commended his nephew as king to the cities of Macedonia.

2 Louis restoring the city of Rome to Pope Paschal is not to the point; for the Franks might properly restore to the Roman people that authority over the city of Rome which they had received from the Roman people; and the Pope might be considered as representing the people.

XIV. Some powers lower than sovereignty are held *pleno jure*: as marquises, counties, baronies, are sold, bequeathed, or otherwise alienated, much more commonly than kingdoms.

XV. 1 Est et alterum hujus discriminis indicium ^ein regni tutela, dum rex ætate aut morbo fungi potestate sua impeditur. Nam in regnis, quæ non sunt patrimonialia, tutela eorum est, quibus lex publica, aut ea deficiente ^fconsensus populi eam mandat. ^gIn regnis patrimonialibus eorum, quos pater aut propinqui elegerint. Sic videmus in Epirotarum regno, quod consensu populi ortum fuerat, Arribæ regi pupillo publice tutores constitutos: et a proceribus Macedonum Alexandri Magni posthumo. At in Asia minore bello parta rex Eumenes Attalo filio fratrem suum tutorem dedit. Sic filio Hieronymo pater Hiero in Sicilia regnans quos voluit testamento tutores assignavit.

Just. xvii. 3.

Just. xiii. 2.
Plut. de
Amore Frat.
Tom. II. pp.
489, 490.
Liv. xxiv. 4.

2 Sive vero rex simul sit privato jure fundorum dominus, ut rex Ægypti post Josephi tempus, et Indorum reges, memorante Diodoro, ac Strabone, seu non sit, hoc imperio extrinsecum est, nec ad ejus naturam pertinet. Quare nec imperii speciem aliam, neque alium habendi imperii modum hoc quidem constituit.

Lib. II. 40.
Lib. xv. p.
704.

XVI. 1 Tertia observatio sit, non desinere summum esse

in Notis Gallicis. Vide HERMANNI CONRINGII Librum *De Germanorum Imperio Romano*, cap. vi. et seqq. J. B.

tomo I. conf. xli. num. 11.

² Sed posito, quod falsissimum, veram esse illam, sive donationem, sive restitutionem, nil refert a quo Franci imperium acceperint in urbem Romam, aut cui postea tradiderint: hoc tantum quaeritur, an Ludovicus arbitrio suo, aut non sine consensu Populi, id fecerit. J. B.

^f *Consensus populi*] Vide Marianam (viii. 10) in Alfonso V. Legionis rege. At testamentum regis Johannis de tutela et administratione regni a proceribus improbatum. Mariana libro xviii. (Cap. 16).

^g Discrimen istud non satis firmo in universum fundamento nititur, ut ostendimus in Notis nostris Gallicis ad hunc locum. J. B.

³ *Marchionatus et comitatus facilius quam regna vendi*] Vide de *Urgetia Principatu* Marianam Lib. xii. cap. 16.

⁴ *Quos pater aut propinqui elegerint*] Ptolomæus rex Ægypti tutorem filio suo reliquit populum Romanum. Valerius Maximus libro vi. cap. vi. 1.

XV. 1 The distinction between patrimonial and non-patrimonial kingdoms is seen in the mode of appointing a Regent or Guardian, when the king, from age or disease, cannot act. In non-patrimonial kingdoms this is done by public law, or that failing, by consent of the people: in patrimonial kingdoms, by the father, or the family. Thus in Epirus, the Regents were appointed by the consent of the people: in the kingdom of Asia, by the will or testament of the sovereign.

2 Whether the king be, in addition, the owner of the land, as the king of Egypt after Joseph, and the kings of the Indian nations, makes no difference in this matter.

XVI. [Sovereignty is not destroyed by grants of rights from the

imperium, etiam si is qui imperaturus est ^hpromittit aliqua subditis aut Deo, etiam talia quæ ad imperii rationem pertineant. ⁴Nec jam de observatione juris naturalis et divini, adde gentium, loquor, ad quam reges omnes tenentur, etiamsi nihil promiserint, sed de regulis quibusdam, ad quas sine promisso non tenerentur. Verum esse quod dico ex similitudine patrisfamilias apparet, qui si quid familiæ facturum se promiserit, quod ad familiæ gubernationem pertineat, non eo desinet in sua familia jus summum, quantum fert familia, habere. Nec maritus maritali potestate privatur, eo quod aliquid uxori promiserit.

2 Fatendum tamen, id ubi fit, arctius quodammodo reddi imperium, sive obligatio duntaxat cadat in exercitium actus, ⁵sive etiam directe in ipsam facultatem. Priore specie actus contra promissum factus erit injustus, quia, ut alibi ostendemus, vera promissio jus dat ei, cui promittitur: ⁶altera autem specie erit etiam nullus defectu facultatis. Neque inde

^h *Promittit aliqua subditis aut Deo*] Trajanus caput suum, domum suam, si scienter fefellisset, deorum iræ consecrabat. Plinius *Panegyrico*, (cap. 64). Adrianus Imperator juravit, nunquam se senatorem, nisi ex Senatus sententia, puniturum. [Spartian. *Vit. ejus*, c. 7.] Anastasius Imperator juravit, servaturum se decreta Chalcedonensis Concilii. Meminere Zonaras, (Lib. xiv. cap. 3). Cedrenus, alii. Seniores Imperatores Græci Ecclesiæ jurabant. Vide eundem Zonaram Michaele Rangabe (Lib.

xv. c. 22) et alibi. Vide et in Gothis regibus exemplum apud Cassiodorum x. 16, 17.

⁴ Vide PUFENDORF. *De Jur. Nat. et Gent.* Lib. vii. cap. vi. § 10, et seqq. J. B.

⁵ Obligatio cadit in exercitium actus, quando, e. g. Rex jus habet tributa aut vectigalia exigendi, sed ad certum quemdam modum tantum, aut in certo genere rerum. Ipsa autem facultas directe minuitur, quando Rex pro imperio nulum potest tributum aut vectigal exi-

Sovereign.]

1 The third observation is, that the authority does not cease to be sovereign, although the Ruler makes certain promises to his subjects, or to God, even of matters relating to the government. I do not now speak of promises to observe Natural Law and Divine Law, or the *Jus gentium*, to which all kings are bound, even without promise; but of the concession of rules to which they could not be bound without promise. The truth of this appears from the analogy of the master of a family, who, though he should have promised to do something which pertains to the government of the family, does not thereby cease to have the supreme power in the family, so far as family matters are concerned. Nor does a husband lose his marital power, by making certain promises to his wife.

2 But still it must be confessed, that when this is done, the sove-

tamen sequitur, ita promittente superiorem dari aliquem; nullus enim is actus non redditur hoc casu ex vi superiore, sed ipso jure.

3 Apud Persas rex summo cum imperio erat, *αὐτοκρατὴς καὶ ἀννπεύθυνος*, ut de eo Plutarchus loquitur, et ut imago Dei adorabatur: et ut apud Justinum est, non mutabatur nisi morte. Rex erat qui dicebat proceribus Persarum: *Ne viderer meo tantummodo usus consilio, vos contraxi: ceterum mementote, parendum vobis magis esse quam suadendum.* Tamen et jurabat cum regnum adiret, quod Xenophonti et Diodoro Siculo ⁷notatum, et leges certa quadam forma latas ¹mutare illi nefas erat, ut et Danielis historia et Plutarchus in Themistocle nos docent, Diodorus quoque Siculus libro xvii. et multo post tempore Procopius Persici belli libro primo, ubi insignis ad hanc rem ^hhistoria exstat. Idem de Æthiopum regibus tradit Diodorus Siculus. Eodem tradente, Ægyptiorum reges, quos tamen, ut alios reges Orientis, sum-

gere, sine consensu Populi. J. B.

⁶ Immo utroque casu facultas agendi æque deficit, ac proinde actus per se æque nullus est. Non video, quo fundamento nitatur distinctio Auctoria. J. B.

⁷ Nescio, ubinam juramenti illius meminerit Diodorus. Neque ad inveniendum juvat heic Baissonius, *De Regio Persarum Principatu*: nam de re ipsa nihil omnino habet, ut nec de eo, quod sequitur. J. B.

¹ *Mutare illi nefas erat*] Josephus in *Historia Vastha*, καταλλαγῆναι εἴ

Οὐδέντι διὰ τὸν νόμον οὐκ ἔδυντο. (*Antiq. Jud.* Lib. xi. c. 6. § 2. *Edit. Huds.*) Cum *Vastha* conciliari lege intercedente non poterat. Tales leges vocabantur leges regni, ut notat Jacchiades ad Danielelem xi. 13. De legibus regnorum in Hispania vide Marianam libro xi. (cap. 3.)

^h *Historia exstat*] Tamen idem de Lethe castello legem a rege mutatam refert, sed non probat. [*Ibid.* cap. 6. In 5: autem insignis historia legitur, quam Auctor indicat.]

reignty is in some degree limited, whether the obligations respect the exercise of certain acts, or directly affect the power. In the first case, an act done against the promise becomes unjust, because, as we shall elsewhere shew, a legitimate promise gives a Right to the promisee: in the second case, the promise is null by reason of defect of the power of making it. But it does not follow from this that the person so promising has a superior; for the promise is null, in this case, not by the act of superior power, but by Natural Law.

3 Thus the Persian king was absolute and irresponsible; yet he took an oath on his accession, and could not change laws duly made. [See the examples.] So the kings of the Ethiopians. So the kings of the Egyptians, who were absolute, were obliged to many observances: if they violated these, they could not be accused in their lifetime; but after their death they were accused, and buried with certain solemnities.

mo imperio usos non est dubium, ad multarum rerum observationem obligabantur: verum si contra fecissent, accusari vivi non poterant, sed mortuorum accusabatur memoria, et damnatis adjudicabatur solennis sepultura: sicut et ^mHebræorum regum, qui male regnassent, cadavera extra proprium regibus locum sepulta, 2 Par. xxiv. 25, xxviii. 27, egregio temperamento, quo et sanctimonia summæ potestatis maneret, et tamen futuri iudicii metu reges a fide mutanda retraherentur. Epiri quoque reges jurare solitos, regnatos se juxta leges, ex ⁿPlutarcho in Pyrrhi vita dicimus.

4 Quid si addatur, si rex fidem fallat, °ut tum regno cadat? ne sic quidem imperium desinet esse summum, sed erit habendi modus imminutus per conditionem, et imperium temporario non absimile. De Sabæorum rege narrabat Agatharchides fuisse ἀνυπεύθυνον liberrima potestate præditum,

Apud Phot.
Cod. 280, p.
1374. et pp.
63, 64. in
Vol. I.
Geograph.
Minor. Huds.

[¹ Mortuorum accusabatur memoria] ἀταφα γὰρ οἱ νόμοι τὰ σώματα τῶν τυράννων ὑπεροπίζουσι· *leges tyrannorum corpora insepulta extra fines projici jubent.* Appianus civilium tertio. (pag. 537.) Andronicus Imperator patrem suum Michaellem, quod fidem Latinam sequi cœpisset, mortuum sepultura privavit. Gregoras Lib. vi. sub init. pag. 75. Edit. Genev.

[^m Hebræorum regum] Vide Josephum de Joramis duobus, altero Hierosolymorum, altero Israelis rege, Lib. ix. cap. v. § 3. et cap. vi. § 3. item de Joaso Hierosolymorum rege. (Ib. cap. viii. § 4.)

[ⁿ Plutarcho] Verba sunt: εὐλαβεῖσθαι

οἱ βασιλεῖς ἐν Κασσαρῶν χάρᾳ τῆς Μολόττιδος ἀρεῆς Διὶ θύσαντες ὀρκωμοτεῖν τοῖς Ἑπειρώταις, καὶ ὀρκίζειν αὐτοὶ μὲν ἀρξέειν κατὰ νόμον, ἐκείνουσι δὲ τὴν βασιλείαν διαφυλάττειν κατὰ τοὺς νόμους. *Solebant reges in Cassarorum terra, qua Molottidos pars est, Jovi Areo sacrificare, ac juramentum præstare Epirotis. Jurabant autem reges se imperaturos secundum leges. Epirotæ autem se imperium ejusdem conservaturos secundum easdem leges.* [Locus exstat pag. 385, c. Tom. i. Ed. Weck. Sed ibi recte legitur, ἐν Πασσαρῶνι χώρῳ etc. non Κασσαρῶν χώρᾳ, ut scripsit Anotor.]

ties. So those Hebrew kings who had reigned ill were buried in places out of the Royal burial-ground. 2 Chron. xxiv. 25; xxviii. 27. And this was an excellent institution, preserving the sacredness of the kingly power, and yet restraining kings from violating their faith by the fear of a future judgment. So the kings of Epirus swore to reign according to the Laws.

4 But suppose the condition to be added, that if the king violate his promise he should lose his kingdom? Even so, his sovereignty does not cease; it becomes a mode of possessing the kingdom, narrowed by the condition, and not unlike to a temporary sovereignty. So the king of the Sabæans, as Agatharchides related, was completely absolute, but if he quitted his palace, was liable to be stoned.

5 So an estate which we enjoy by a trustee is ours no less than if it were possessed in full property; but it ceases to be ours when the

sed si regia exiret potuisset lapidari: quod et Artemidoro auctore Strabo annotavit.

Lib. xvi. p. 778.

5 Sic fundus, qui fideicommisso tenetur, est quidem fundus ⁸noster non minus quam si pleno dominio possideretur, sed habetur amissibiliter. Talis autem lex commissoria non tantum in regni delatione adjici potest, sed et in aliis contractibus. Nam et fœdera quædam cum vicinis videmus cum ⁹tali sanctione inita.

XVII. 1 Quarto notandum, quamquam summum imperium unum quiddam sit ac per se indivisum, constans ex illis partibus, quas supra enumeravimus, addita summitate, id est, τῇ ἀννευθύνῃ, ⁹fieri tamen interdum ut dividatur, sive per partes, quas vocant potentiales, sive per partes subjectivas. ⁸Sic cum unum esset Romanum imperium, factum tamen sæpe est, ut alius orientem, alius occidentem teneret, aut ut tres

* *Ut tum regno cadat*] Vide exemplum apud Crantzium libro ix. Suedicorum.

⁸ Addidi vocem *noster*, quæ in omnibus Edd. excidit, propter similitudinem sequentis *non*, a typographis prætermissa. Res ipsa illam postulat: quid enim hoc est, *Fundus, qui fideicommisso tenetur, est fundus*? Est quoque Fundus, ubi Colono traditus est. Agitur omnino hec de re, quæ nostra est, quamquam non possideatur *pleno dominio* et irrevocabili. Fallor, an Auctor in mente habuit quod ait Paulus, l. 68. *De rei vindicat. Non ideo minus recte quid nostrum esse vindicabimus,*

quod abire a nobis dominium speratur, si conditio legati aut libertatis extiterit. Hæc plane gemina. J. B.

† *Tali sanctione*] Aut etiam ne subditi regem pacta violentam juvent; aut ne ei pareant: vide Cromerum *Policis* xix. et xxi. Est et exemplum apud Schafnaburgensem in rebus Henrici anno cldxxiv. (pag. 499. Edit. Argentor. 1609).

‡ *Fieri tamen interdum ut dividatur*] Vide Zasium *Singularium Responsorum* Lib. II. cap. xxxi.

§ Vide PUFENDORF. *De Jur. Nat. et Gent.* Lib. vii. cap. iv. § 1. et cap. v. § 15. J. B.

conditions of the trust direct. Such conditions belong to other contracts, as well as to the tenure of government. Some leagues with neighbours seem to have been made with such a sanction.

XVII. 1 The Sovereignty may be divided according to its *potential* or its *subjective* parts.

The Sovereignty consists of the parts which we have mentioned [see § vi.], with the addition of irresponsibility: but it may be divided either according to the powers [deliberative, judicial, &c.] or the subjects who are governed. Thus the Roman Empire, though one, was often divided, so that one Ruler had the East, another the West; or into three parts. So too it may happen that a people when it chooses a king may reserve certain acts to itself, and may commit others to the king, *pleno jure*. This is not the case whenever the king is bound by certain promises, as we have shewn; [§ xvi.] but is to be

etiam tripartito orbem regerent. Sic etiam fieri potest, ut populus regem eligens quosdam actus sibi servet, alios autem regi deferat pleno jure. Neque tamen id fit, ut jam ostendimus, quotiescumque rex promissis quibusdam obligatur; sed tunc id fieri intelligendum est, ^rsi aut expresse instituitur partitio, qua de re supra jam diximus, aut si quid populus adhuc liber futuro regi imperet per modum manentis præcepti; aut si quid sit additum, quo intelligatur regem cogi aut puniri posse. Nam præceptum est superioris, saltem in eo quod præcipitur. Et cogere non est quidem semper superioris: nam et naturaliter quisque jus habet cogendi debitorem, sed cum inferioris natura pugnat. Itaque ex coactione saltem paritas sequitur, ac proinde summitatis divisio.

2 Multi adversus talem statum quasi bicipitem incommoda multa adferunt; sed, ut supra quoque diximus, in civilibus nihil est quod omni ex parte incommodis careat; et jus non ex eo, quod optimum huic aut illi videtur, sed ex voluntate ejus unde jus oritur metiendum est. Exemplum vetus refertur a Platone de legibus tertio. Cum enim Heraclidæ

pp. 683, 684.
Tom. II.

^r Si aut expresse instituitur partitio] Ita Probi tempore senatus firmabat principum leges; de appellationibus cognoscebat; Proconsules creabat; legatos consulibus dabat. [Habet hoc Auctor e Vopisco, in Prob. cap. 13. ubi

legendum *Legatos ex Consulibus*, ostendit *Salmasius*.] Vide et Gall. Lib. II. Observ. LVII. num. 7. et Cardinalem Manticam de *Tacitis et Ambiguis Con-ventionibus*, Lib. XXVII. tit. v. num. 4.

^a *Ipsi inter se reges populique inter*

understood to happen then, when either the partition of power is expressly instituted, concerning which we have already spoken; or if a people, hitherto free, lay upon the king some perpetual precept; or if anything be added to the compact, by which it is understood that the king can be compelled or punished. For a precept is the act of a superior, at least in the thing commanded: to compel, is not always the act of a superior; for by Natural Law every creditor has the Right of compelling his debtor to pay; but to compel is at variance with the nature of an inferior. Therefore in the case of such compulsion, a parity of powers at least follows, and the Sovereignty is divided.

2 Many persons allege many inconveniences against such a two-headed Sovereignty; but in political matters nothing is quite free from inconveniences; and Rights arise, not from what seems to one or another convenient, but from the will of him who is the origin of Rights. For example, the kings established by the Heraclidæ in Argos, Messena, and Sparta, were bound to govern within the rules of the law; and so long as they did so, the people were bound to preserve the

Argos, Messenam, et Lacedæmonem condidissent, adstricti reges intra præscriptarum legum modum imperare, idque dum facerent obligati populi ipsis ipsorumque posteris regnum relinquere, nec ut quisquam adimeret pati. Inque id non suis tantum regibus populi ac populis suis reges, sed et ipsi inter se reges, populique inter se, et reges vicinis populis, et populi vicinis regibus fidem dederunt, auxilioque se futuros alii aliis polliciti sunt.

XVIII. 1 Multum tamen falluntur qui existimant, cum reges acta quædam sua nolunt rata esse, nisi a Senatu aut alio cœtu aliquo probentur, partitionem fieri potestatis: nam quæ acta eum in modum rescinduntur, intelligi debent rescindi regis ipsius imperio, qui eo modo sibi cavere voluit, ne quid fallaciter impetratum pro vera ipsius voluntate haberetur: quale erat Antiochi tertii regis rescriptum ad magistratus, ne sibi parerent, si quid legibus adversum jussisset; et Constantini, ne pupilli aut viduæ cogantur venire iudicii causa ad comitatum Imperatoris, etiamsi Imperatoris rescriptum proferatur.

Boer. ad c. 1
de Const. in
Decret.

Plutarch.
Apoph. Tom.
II. p. 183.

L. Unica C.
quando im-
perator.

æ] Exempla sunt complura in historia populorum Septentrionalium: vide Johannem Magnum *Historia Suedica* Lib. xv. et xxix. Crantsium *Suedicorum* v. Pontanum *Danicorum* viii. [pag.

468, et seqq. Ed. Amst. 1631].

Etiam si Imperatoris rescriptum proferatur] Adde l. 1. c. de *Petitionibus bonorum sublati*q.

throne to them.

Also such engagements have been made, not only between the king and his people, but among different kings, and among different peoples; and between kings and neighbouring peoples; each giving such a *guarantee* to the other.

XVIII. 1 There is no partition of the Sovereignty, in cases when kings allow their own acts not to be valid except when approved by some assembly*. For acts which are thus rescinded are to be understood to be rescinded by the authority of the king; who provided such a caution against fallacious representations. So Antiochus the Third sent a rescript to the magistrates, that if he commanded anything contrary to the Laws, they should not obey him: and Constantine directed that widows and orphans should not be compelled to come to the Emperor's court for judgment, though a rescript of the Emperor to that effect should be produced.

* As the king of France has his edicts registered by the Parliament. *Gro-novius*.

2 Quare hæc res similis est testamentis, quibus adjectum est, ne posterius testamentum valeat: nam hæc quoque clausula efficit, ¹ut posterius testamentum non ex vera voluntate profectum præsumatur. Sed sicut hæc clausula, ita et illa regis jussu expresso ac speciali posterioris voluntatis significatione tolli potest.

Lib. vi. 9. et
seqq.

XIX. Sed neque Polybii hic utor auctoritate, qui ad mixtum genus reipublicæ refert Romanam rempublicam, quæ illo tempore, si non actiones ipsas, sed jus agendi respicimus, mere fuit popularis: nam et Senatus auctoritas, quam ad optimatum regimen refert, et consulum, quos quasi reges fuisse vult, subdita erat populo. Idem de aliorum politica scribentium sententiis dictum volo, qui magis externam speciem et quotidianam administrationem, quam jus ipsum summi imperii spectare congruens ducunt suo instituto.

Polit. iii. 15.

XX. 1 Magis ad rem pertinet quod Aristoteles scripsit, inter regnum plenum, quod *παμβασιλείαν* vocat, (eadem est *παντελής μοναρχία*, Sophocli *Antigone*, Plutarcho *αυτοκρατής βασιλεία καὶ ἀνυπεύθυνος*, Straboni *ἐξουσία αὐτοτελής*) et regnum Laconicum, qui merus est principatus, ali-

Ver. 1881.
De Trib. Gen.
Rerump. p.
896 A.
Geogr. vi. in
fin. p. 288.

¹ Hoc equidem Juri Romano non congruit, quamquam in Foro obtineat. Vide Cujacium, *Observ.* xiv. 7 et VINCIUM in *Instit. Tit. Quibus modis Test. infirmantur*, § 2. Sed recepta illa sententia, quam Auctor noster heic probat, et de qua etiam aliquid dicit in *Epist.* Part. II. ep. 10. verior est, secundum Jus Naturale; ut in Notis Gallicis ostendimus. *J. B.*

² Παντελής μοναρχία] Faciunt enim, ut ad § viii. notavimus, Tragici regnum Thebanum simile regnis Phœnicum, unde orti erant.

³ Αυτοκρατής βασιλεία] Sic Dionysius Halicarnassensis de *Laconicis regi-*

bus: οὐδὲ γὰρ οἱ Λακεδαιμόνιοι αὐτοκράτορες ἦσαν· neque enim *Lacedæmonii pleno jure reges erant.* (*Ant. Rom.* Lib. II. c. 14).

⁴ Quales habebant vicini] Putabat populus, ut Josephi verbis utar, οὐδὲν ἀποκον εἶναι τῶν πλησιοχώρων βασιλευμένων τὴν αὐτὴν ἔχειν αὐτοὺς πολιτείας· nihil esse absurdi, si, cum vicini regnarentur, ipsi eandem imperii formam acciperent. (*Ant. Jud.* vi. 4.)

⁵ Imitatur loquutionem Taciti, ubi tamen optimæ Editiones habent *adductus*, non *addictus*: *Trans* Lygios Gothones regnantur, paullo jam adductus quam cetera Germanorum gentes. *Germ.*

2 The case is like that of a testament in which it is added that no subsequent testament shall be valid; for this clause has the effect of making a later testament presumed not to be the real will of the testator. But as this clause may be rescinded by an express and special signification of the will of the writer, so may that direction of the king.

XIX. I do not here use the authority of Polybius, who refers the Roman State to the class of mixed Sovereignty. For at that time, if

quot regni species esse interjectas. Ego exemplum hujus rei dari arbitror posse in regibus Hebræis: nam hi quin in rebus plerisque summo jure imperaverint, dubitari nefas arbitror. Voluerat enim populus regem, ¹quales habebant vicini: at orientis populi ²addicte admodum regnabantur. *Æschylus* Perais de rege Persarum sic loquentem facit *Atossam* [v. 213]:

οὐχ ὑπεύθυνος πόλει.

Non est civitati obnoxius.

Notum illud Maronis [*Georg.* iv. 210, et seqq.]:

Regem non sic *Ægyptus* et ingens

Lydia, nec populi Parthorum, aut *Medus Hydaspes*

Observant.

Apud *Livium*: *Syri et Asiatici genera hominum servituti* Lib. xxxvi. 17.

nata: a quo non discrepat illud *Apollonii* apud *Philostratum*:

Ἀσσύριοι καὶ Μῆδοι τὰς τυραννίδας προσκυνοῦσι. *Assyrii et Medi dominationem etiam adorant.* Aristotelis iii. *Politico-* vii. *Apoll.* vil. 14.

corum xiv. οἱ περὶ τὴν Ἀσίαν ὑπομένουσι τὴν δεσποτικὴν ἀρχήν, οὐδὲν δυσχεραίνοντες. *Asiatici dominatum æquo animo ferunt.* Et apud *Tacitum* *Civilis Batavi* illud ad Gal- Hist. iv. 17.
los: *“Servirent Syria Asiaque et suetus regibus oriens:*

cap. 43. ubi vid. Int. [V. infra § 4]. *J. B.*

¹ *Servirent Syria Asiaque et suetus regibus oriens* *Cicero de Provinciis Consularibus* (cap. 5): *Judeis et Syris nationibus natis servituti.* *Euripides Helena* (vers. 283):

Τὰ βαρβάρων γὰρ δοῦλα πάντα πλὴν ἐνός.
Sunt præter unum serva cuncta in barbaria.

Quod ex *Æschylo* adumbratum, apud quem est: *Prometh. Vinc.* pag. 8. *Ed. H. Steph.* [v. 80]:

Ἐλεύθερος γὰρ οὗτος ἐστὶ πλὴν Διός.
Nam nemo liber vivit, extra unum Jovem.

Cui simile *Lucani* dictum (ii. 280):

toto jam liber in orbe
Solutus Cæsar erit.

Sallustius de Gentibus Orientis [*Fragm.*

ap. Serv. ad *Georg.* iv. v. 211]: *Adeo illi ingenita est sanctitas regii nominis.* Citant *Servius* et *Philargyrius* ad illum in *Georgicis* (iv. 210) locum. *Apolonius de Damide* apud *Philostratum* libro vii. Ἀσσύριος γὰρ ὦν καὶ Μῆδοις προσοικίζων οὐδὲν ὑπὲρ ἐλευθερίας ἐνθυμεῖται μέγα. (Cap. 14. *Ed. Olear.*) *Assyrius cum sit et Medorum accola, nihil pro libertate præclarum cogitat.* *Julianus contra Christianos*: τί με χρεὶ καθ' ἕκαστον ἐπιέναι τὸ φιλελεύθερόν τε καὶ ἀνυπότακτον Γερμανῶν ἐπεξιδόντα, τὸ χειροθῆς καὶ τίθασσον Σύρων καὶ Περσῶν καὶ Παρθῶν καὶ πάντων

we look, not at the acts, but at the right of acting, it was merely democratic: for both the authority of the Senate, which he regards as an aristocracy, and that of the Consuls, whom he considers as kings, was subject to the People. And the same is to be said with respect to other political writers, who regard external appearances and daily administration, rather than the question of Rights.

XX. Examples of mixed Sovereignty. [See the text.]

1 The Hebrew kings were absolute, like other oriental monarchs:

Germ. ii.

nam et in Germania, et in Gallia tum reges erant, sed, ut idem Tacitus notat, precario jure regnandi et auctoritate suadendi, non jubendi potestate.

Apolog.
David. c. 10.

2 Supra quoque notavimus, totum populum Hebræum fuisse sub rege: et Samuel jus regum describens satis ostendit adversus regis injurias nullam in populo relictam potestatem: quod recte colligunt veteres ex illo Psalmi: *Tibi soli peccavi*: ad quem locum Hieronymus: ³*Quod rex erat, et alium non timebat.* Et Ambrosius: *Rex erat, nullis ipse legibus tenebatur, quia liberi sunt reges a vinculis delictorum.* Neque enim ullis ad pœnam vocantur legibus, ^b*tuti imperii potestate: homini ergo non peccavit, cui non tenebatur obnoxius.* Idem legere est apud Isidorum Pelusiotam epistola postremo edita CCCLXXXIII. Video consentire Hebræos, ⁴*regi in eas leges quæ de officio regis scriptæ exstabant peccanti inflicta verbera: sed ea apud illos infamia carebant, et a rege in signum pœnitentiæ sponte suscipiebantur, ideoque non a lictore, sed ab eo, quem legisset ipse, cædebatur, et suo arbitrio verberibus statuebat modum.* A pœnis autem coactivis adeo liberi erant reges, ut etiam excalceationis lex, quippe cum ignominia conjuncta, in ipsis cessaret. Hebræi Barnachmoni sententia exstat in dictis Rabbiorum, titulo de Judicibus: *Nulla creatura judicat regem, sed Deus benedictus.*

[Deut. xxv. 9;
Ruth iv. 7. a.]Exod. xxii. 28.
Psal. lxxxii. 1.

3 Hæc cum ita sint, tamen aliqua judicia arbitror regibus ademta, mansisse penes Synedrium LXX. virum, quod divino imperio a Mose institutum ad Herodis tempora perpetua ⁵cooptatione duravit. Itaque et Moses et David iudices Deos

ἀπλῶς τῶν πρὸς ἑαυτὸν καὶ πρὸς μεσημβρίαν βαρβάρων, καὶ ὅσα τὰς βασιλείας ἀγαπᾷ κεκτημένα δεσποτικωτέρως·
Quid tibi jam singulatim exsequar aut Germanorum libertatis amantia et impatientia jugi ingenia, aut contra dociles herilem manum ferre Syros, Persas et Parthos, et omnes, qui aut ad orientem aut ad meridiem sunt, barbaros multasque gentes alias contentas sub regibus vivere dominos imitantibus? (Apud Cyrill. pag. 138. Ed. Spanhem.) Claudianus (*De IV. Cons. Hon.* vers. 306):

Non tibi tradidimus dociles servire Sabæos:
Armeniarum dominum nec te præfecimus oras.

^a Nil tale habet Hieronymus, in hunc quidem Psalm. li. locum: sed alibi. Vide SALMASII *Resp. ad Miltonum*, pag. 205. et seqq. ubi plures alios Patres laudat, ita perperam, suo more, verba Davidis exponentes. Circa rem ipsam vide MILTONUM, *Defens. pro Pop. Anglic.* Cap. 2, pag. m. 32. et RABOD. HERMAN. SCHÆLIUM, *De Jure Imperii*, pp. 255, 256. J. B.

^a *Alium non timebat*] Idem Hiero-

2 The Hebrew king had peculiar exceptions from the law:

3 Yet some cases were reserved to the Sanhedrim.

vocant, et judicia vocantur judicia Dei: et judices dicuntur non humana, sed divina vice judicare. Imo aperte distinguuntur res Dei a rebus regis, ubi res Dei, monentibus doctissimis Hebræorum, judicia ex lege Dei exercenda intelligi debent. Non nego regem Judæorum capitalia quædam judicia per se exercuisse: qua in re ipsum regi decem tribuum Israeliticarum præfert Maimonides: quod et exempla non paucum in sacris literis, tum in scriptis Hebræorum evincunt: sed quædam cognitionum genera regi videntur non permissa, ut de tribu, de pontifice, de propheta. Ejusque rei argumentum est in Jeremiæ prophetæ historia, quem cum proceres ad mortem deposcerent, respondit Rex: *Ecce in potestate vestra est, nam contra vos rex nihil potest*: in hoc negotiorum genere scilicet. Imo et qui alia quavis de causa apud Syne-drium reus factus esset, eum rex judicio eximere non poterat. Ideo Hyrcanus judicium de Herode (cum impedire non posset) arte elusit.

Deut. i. 17. et 2 Chron. xix. 6, 8.

1 Chron. xxvi. 32. et 2 Chron. xix. 11.

Jer. xxxviii. 6.

Joan. Anl. xiv. cap. 8. § 4.

4 In Macedonia a Carano orti, ut apud Arrianum Callisthenes ait, *οὐ βίη ἀλλὰ νόμῳ Μακεδόνων ἄρχοντες διετέλεσαν* non vi, sed lege in Macedonas imperium obtinebant. Curtius libro iv. *Macedones assueti regio imperio, sed in majore libertatis umbra quam ceteræ gentes*. Nam et judicia de civium capite non erant penes regem. Idem Curtius lib. vi. *De capitalibus rebus vetusto Macedonum modo inquirebat exercitus: in pace erat vulgi: nihil potestas regum valebat, nisi prius valuisset auctoritas*. Est et alterum mixturæ hujus indicium alio Curtii loco: *Macedones scivere gentis suæ*

De Exped. Alex. iv. 11.

Cap. vii. num. 31.

Cap. viii. n. 24.

Lib. vii. l. n. 18.

nymus *epistola ad Rusticum de Patientia*: Rex enim erat: alium non timebat: alium non habebat super se. (Tom. i. pag. 221 B.)

^b *Tuti imperii potestate*] Paria habet ad eundem Psalmum Arnobius minor. Vitiges apud Cassiodorum: *Causa regie potestatis supernis est applicanda judiciis, quandoquidem illa a cælo petita est, ita soli cælo debet innocentiam*. [Locus jam adlatus supra ad § viii. num. 15. ubi vide quæ diximus. J. B.]

^c *Mera fabula, quam plenissime confutavit SALMASIUS, Defens. Reg. cap. ii.*

et post illum alii. Rationes ab utraque parte adlatas collegit SELDENUS, *De Synedriis*, Lib. iii. cap. 9. ubi ipse rem in medio relinquit. J. B.

^a Perpetuitatem illam, in dubium a quibusdam jam revocatam, funditus evertit Clar. CLERICUS, in *Judicio de Hist. Critic. Simontii*, Gallicè edito, Epist. x. et postea Diss. singulari subjecta Commentario in Libros Historicos V. T. J. B.

^c *De propheta*] *Non capit prophetam perire extra Jerusalem*. Luc. xiii. 33.

4 Mixed sovereignty among the Macedonians: the Gothones; the Pheacians:

more, ne rex pedes venaretur, aut sine electis principum amicorumve. Tacitus de Gothonibus: *Regnantur paulo jam addictius quam ceteræ Germanorum gentes, nondum tamen supra libertatem.* Nam principatum ante descripserat auctoritate suadendi, non jubendi potestate: regnum autem plenum postea his verbis: *Unus imperitat, nullis jam exceptionibus, non precario regnandi jure.* Eustathius ad sextum Odysseæ, ubi Phœacum respublica describitur, ait esse *συνέλευσιν βασιλείας καὶ ἀριστοκρατίας*, ^d *mixtum aliquid ex regis et procerum potestate.*

5 Simile quid in Romanorum regum temporibus observo: nam tum omnia ferme negotia manu regia expediebantur. *Ann. lli. 26. Romulus nobis, ut libitum, imperaverat, inquit Tacitus. Constat initio civitatis reges omnem potestatem habuisse, inquit Pomponius: tamen quædam populo excepta, etiam illo tempore, vult Halicarnassensis. Quod si Romanis magis credimus, in causis quibusdam provocationem ad populum a regibus fuisse ex Ciceronis de republica libris, ex pontificalibus quoque libris et Fenestella annotavit Seneca. Mox Servius Tullius, non tam jure quam auris popularibus ad regnum pervectus, plus etiam vim regni imminuit: quippe, ut loquitur Tacitus, Sanctorum legum quæis etiam reges obtemperarent.* Quominus mirandum quod Livius dicit, primorum consulum potestatem a regia hoc ferme uno distitisse, quod annua esset.

^d *Mixtum aliquid ex regis et procerum potestate]* Leonicius Chalcocondylas talia ait esse regna Pannonum et Anglorum, libro ii, Arragonum Lib. v, et Navarræ eodem libro, ubi ait nec magistratus a rege creatos, nec præsidia imposita nisi volentibus, nec quicquam populo imperatum contra mores. Reges alios esse pleno cum jure, alios sub legibus, etiam Judæus Levi Gersonides notavit ad 1 Sam. viii. 4. Mira quæ de Taprobane scribit Plinius Lib. vi.

cap. xxi: *Eligi regem a populo senecta clementique, liberos non habentem, et, si postea gignat, abdicari, ne fiat hereditarium regnum. Rectores ei a populo xxx. dari, nec nisi plurium sententia quengquam capite damnari. Sic quoque appellationem esse ad populum: lxx. judices dari. Si liberent ii reum non amplius xxx.* [ita enim legi locus hic debet] *tis nullam esse dignitatem, gravissimo probro. Regi cultum Liberi patris, ceteris, Arabum. Regem, si quid*

5 Under the Roman kings:

6 In Rome under the early Consuls:

7 In Athens at the time of Solon.

These points being settled, let us examine certain questions which often occur in this matter.

XXI. 1 First, Whether one who is bound by an unequal alliance can have sovereign power.

6 Similis etiam mixtura ex populari et optimatum potentia Romæ fuit tempore interregni, et primis consulum temporibus: nam in rebus quibusdam, iisque majoribus, ita demum ratum erat quod populus jussisset, *si Patres auctores fierent: quod postea, vi populi aucta, speciem tantum veterem retinuit, cum in incertum comitiorum eventum Patres auctores fieri cœperunt, ut Livius et Dionysius notant. Quin et serius aliquanto mixturæ mansit aliquid, quamdiu, ut idem loquitur Livius, imperium penes Patricios, (id est, Senatum,) penes tribunos (id est, plebem) auxilium erat, jus nempe vetandi, sive intercedendi.

Lib. i. 17.
Ant. Rom. ii.
14.

Liv. vi. 37. n.
4.

7 Sic et Isocrates Atheniensium rempublicam Solonis temporibus vult fuisse *δημοκρατίαν ἀριστοκρατία μεμυγμένην*, potestatem optimatum populari mixtam. His positis, quæstiones quasdam, quæ frequentem in hoc argumento usum habent, examinemus.

Orat. Panath.
p. 365 A.

XXI. 1 Prima est, an summum imperium habere possit is qui inæquali fœdere tenetur? Inæquale fœdus hic intelligo, non quod inter viribus dispares initur, quomodo Thebana civitas Pelopidæ tempore fœdus cum Persarum rege habuit, et Romani olim cum Massiliensibus, deinde cum rege Masaniissa: nec quod actum habet transeuntem, ut cum hostis qui sit ad amicitiam recipitur, dum impensas belli solvat, aut aliud quid præstet: sed quod ex ipsa vi pactionis manentem prælationem quandam alteri donat: hoc est, ubi quis tenetur alterius im-

Plutarch. Vit.
Pelop. p. 394
D.

Justin. xliii. 5.
Val. Max. v.
2. ext. n. 4.

delinquat, morte mulctari, nullo interimento, sed aversantibus cunctis, et commercia etiam sermonis negantibus. Servius ad illud iv. *Æneidos*: *Populumque patresque.* Quidam hoc loco volunt tres partes politia comprehensas, populi, optimatum, regis potestatis. Cato enim ait de tribus istis partibus ordinatam fuisse Carthaginem. (In vers. 682). [Non videtur necessaria emendatio, quam Auctor noster heic obiter, in loco Plinii, vult fieri: et verba, ut legantur,

recte exponit Harduinus, not. 7, pag. 324. Tom. i. Ed. in fol. J. B.]

* Si patres auctores fierent] Plutarchus Coriolano (pag. 227 E. Ed. Weck.): *ὁ δῆμος ἀκυρος ἦν τοῦ ψήφου καὶ νόμου τι ποιεῖν ἀνευ προβουλευματος.* Populus jus non habebat aut legem condendi, aut aliud quid jubendi, nisi Senatus præcessisset auctoritas. Similem mixturam in Genuatium republica suis temporibus observat Chalcocondylas libro v.

By an unequal alliance, or unequal league, I do not mean one in which the parties have a different amount of power; as the league of the Thebans with the Persians at the time of Pelopidas; and of the Romans with the Massilians, and afterwards with king Masaniissa; nor a league which has a transient operation, as when he who was an enemy is received into amity, on condition of paying the expences of the war, or any other consideration; but a league which by the force

perium ac majestatem conservare, ut in fœdere Ætolorum cum Romanis erat, id est, tum operam dare, ut ejus imperium in tuto sit, tum ut dignitas, quæ majestatis nomine significatur, ei constet. Imperii reverentiam dixit Tacitus, et sic explicat: *Sede finibusque in sua ripa, mente animoque nobiscum agunt.* Florus: *Illi quoque reliqui, qui immunes imperii erant, sentiebant tamen magnitudinem, et victorem gentium populum Romanum reverebantur*; ad quod genus referenda sunt jura quædam eorum, quæ nunc vocantur protectionis, advocatiæ, mundiburdii: item jus urbium matricum in colonias apud Græcos. Nam, ut Thucydides ait, coloniæ cum urbibus matricibus pari erant jure libertatis, sed debebant *τιμῶν τὴν μητρόπολιν*, et exhibere *τὰ γέρα τὰ νομιζόμενα*, reverentiam scilicet et honoris signa quædam.

Germ. 29.

Lib. iv. 12.
n. 61.

Lib. iv. 24, 25.

Lib. i. 52. n. 4.

Nte. Paraph.
viii. 18. p. 567.L. non dubi-
to. D. de
capt. et post.
7. § 1.

2 Livius de veteri fœdere inter Romanos, qui Albæ jus omne acceperant, et Latinos Alba oriundos: *In eo fœdere superior Romana res erat.* Recte Andronicus Rhodius, post Aristotelem, amicitia inter dispares hoc ait proprium, ut potentiori plus honoris, infirmiori plus auxilii deferatur. Scimus quid ad hanc quæstionem Proculus responderit, scilicet liberum esse populum, qui nullius alterius potestati subjectus sit, etiam si in fœdere comprehensum sit, ut is populus comiter alterius populi majestatem conservaret. Si ergo populus tali fœdere

^o Legendum cum HALOANDRO: *Nec viribus nobis pares sunt*, &c. J. B.

ⁱ *Sic populi fœdere inferiores*] Vide Cardinalem Tuschum pp. conclud. 10 cccc xxxv. Exemplum habes in Dillmnitis, [vel Dolomitis, ut alibi vo-

cantur. Vid. Illustr. SPANHEMII *Orb. Rom.* II. 17. pag. 452] qui *αὐτόνομοι* sui que juris Persis militabant, apud Agathiam libro III. (cap. 8.) Sic Irenes consilium fuit, inter mariti liberos ita partiri imperium, ut post natos faceret

of the compact gives a permanent precedence to one of the parties: when for instance, the one party is bound to preserve the authority and majesty of the other, as was the case in the league of the Etolians with the Romans. [See the explanation in the text.] To this relation are referred what are called the Rights of Protectorate, Advocacy, Patronage, and the Rights of the Mother-cities in Greece over their Colonies. [See Thucydides.] So the league between Alba and Rome.

2 This is the characteristic of an alliance between unequals; that the greater share of power goes to the stronger, the greater share of advantage to the weaker. [Andronicus Rhodius.] And a people is free which is not under the power of any other, even though there be a league in which it is stipulated that it shall preserve the majesty of another people: [as Proculus pronounced.] Since therefore a people

obligatus liber manet, si alterius potestati subjectus non est, sequitur, ut summum imperium retineat. Atque idem de rege pronunciandum est. Est enim populi liberi et regis, qui vere rex sit, eadem ratio. Addit Proculus, illud adjici in fœdere, ut intelligatur alterum populum superiorem esse, non ut intelligatur alterum non esse liberum. Superiorem hic intelligere debemus non potestate (jam enim dixerat talem populum alterius potestati subjectum non esse) sed auctoritate, et dignitate: quod verba sequentia apta admodum similitudine explicant. *Quemadmodum, inquit, clientes nostros intelligimus liberos esse, etiamsi neque auctoritate, neque dignitate, neque jure omni nobis pares sunt: sic et eos, qui majestatem nostram comiter conservare debent, liberos esse intelligendum est.*

3 Clientes in fide sunt patronorum; sic populi fœdere inferiores in fide populi, qui dignitate est superior. Sunt ἐπὶ προστάταις, οὐχ ὑποτελεῖς, *sub patrocínio, non sub ditione*, ut Sylla apud Appianum loquitur; in parte, non in ditione, ut Livius: et Cicero officiorum secundo sanctiora illa Romanorum tempora describens, patrocínium sociorum ait penes eos fuisse, non imperium: quicum satis convenit dictum illud Scipionis Africani Majoris: *Populum Romanum beneficio quam metu obligare homines malle, exterarumque gentes fide ac societate*

Μισθ. p. 212.

Lib. xxi.
Cap. 8.

Lib. xxvi. 49.
n. 8.

δευτέρους μὲν κατὰ τὸ τῆς τιμῆς ἀξίωμα, αὐτονόμους δὲ καὶ ἀντοκράτορας ἑκάστους, *dignitate quidem minores, ceterum sui juris plenæque potestatis.* Vide Crantsium *Saxonicorum* x. (cap. 3) de urbibus, quæ se in Aus-

triacorum protectionem dedere. Herodotus: Ὀστρονῶν τε καὶ Ἀρμενίων, ὧν ἦσαν οἱ μὲν ὑπήκοοι, οἱ δὲ φίλοι καὶ σύμμαχοι. *Ostroënorum et Armeniorum, quorum hi subditi erant, illi amici ac socii.* Lib. vii. (c. 2.)

bound by such a league is free, it follows that it preserves its sovereignty.

The same may be said of a king; for there is an entire analogy between a free people, and a king who is truly a king. Proculus adds, that though one of the peoples be superior, both are free; superior is here understood not of power, but of authority and dignity. So Clients are free, yet inferior to Patrons.

3 Clients are under the protection of their Patrons (*in fide patronorum*); so in an unequal alliance, the inferior people is under the protection of the people superior in dignity. They are under their patronship, not under their authority, *sub patrocínio, non sub ditione*. There are many examples of this distinction, in Appian, Livy, Cicero, Strabo. [See the text.] As private patronship does not take away personal liberty, so public patronship does not take away public liberty,

Geogr. viii.
p. 365.

[De Syllæo
vide Strabon.
Lib. xvi. p.
781, 783, &.]

[ap. Tacitum
Ann. xv. 18.]

Lib. xvi. 46.
p. 534.

junctas habere, quam tristi subjectas servitio: et quæ Strabo commemorat de Lacedæmoniis pōst Romanorum in Græciam adventum: ἔμειναν ἐλεύθεροι, πλην τῶν φιλικῶν λειτουργιῶν ἄλλο συντελοῦντες οὐδέν *manserunt*, inquit, *liberi, nihil conferentes præter operas sociales*. Sicut patrociniū privatum non tollit libertatem personalem, ita patrociniū publicum non tollit libertatem civilem, quæ sine summo imperio intelligi nequit. Ideo apud Livium opponi videas, *in fide esse et in ditione*. Et Syllæo Arabum regi minatus est Augustus, teste Josepho, ni injuriis in vicinos abstineret, curaturum se, ut ex amico subditus fieret; cujus conditionis erant reges Armeniæ, quos in ditione Romana fuisse ad Vologesen scribebat Pætus, et proinde sono magis nominis quam re ipsa reges: quales Cypri aliique reges olim sub regibus Persis, ὑποταγέντες, subditi, ut Diodorus loquitur.

4 Obstat his quæ diximus videtur, quod addit Proculus: *At sunt apud nos rei ex civitatibus fœderatis, ei in eos damnatos animadvertimus*. ^aSed ut hæc res intelligatur, sciendum est quatuor incidere posse controversiarum genera. Primum, si subditi populi aut regis, qui in fide est alterius, dicantur fecisse contra fœdus: deinde, si ipsi populi aut reges accusentur: tertio, si socii, qui in ejusdem populi aut regis fide sunt, inter se litigent: quarto, si subditi conquerantur

^a Vide, exempli gratia, Lib. viii. cap. i. in fine; et Lib. xxxvi. cap. 28. num. 4. J. B.

^b Solvitur omnino difficultas, ex illis

verbis petita, adeoque hactenus super-
vacanea sunt, quæcumque Auctor sub-
jicit, si animadvertatur, quod verissi-
mum est, Populos, et Reges, qui tunc

which cannot exist without sovereignty. Other kings, on the contrary, were really subjects of the superior power, as the kings of Armenia to the Romans, the kings of Cyprus to the Persian king. [See the authorities: Gronovius adds, for the Armenians, *Florus*, 4, 12.]

4 Proculus adds that *We* (the Romans) *take cognisance of criminals in the federate cities*; which seems at variance with what we have said. To understand this, we must know that there may be four kinds of controversies in such cases. First, if the subjects of the people or king which is under the protection of another, be charged with violation of the terms of the league: secondly, if the peoples or kings themselves be so charged: thirdly, if the allies, who are under the protection of the same people or king, have a dispute among themselves: fourthly, if the subjects complain of wrong done them by those under whose authority they are.

In the first case, if the offence be apparent, the king or people is

de injuriis eorum, quorum sunt in ditione. Prima specie si peccatum appareat, tenetur rex aut populus eum, qui nocuit, aut punire, aut ei cui nocitum est dedere: quod non tantum inter inæquales, sed et inter æqualiter fœderatos locum habet, imo etiam inter eos, qui nullo fœdere tenentur, ut ostendemus alibi. Tenetur etiam dare operam ut damna resarciantur; [IL xxi. 4.] quod officium Romæ erat recuperatorum. Gallus Ælius apud Festum: *Reciperatio est cum inter populum et reges nationesque ac civitates peregrinas lex convenit, quomodo per recuperatorem reddantur res, recipereanturque, resque privatas inter se persequantur.* At sociorum alter in socii subditum jus prehensionis aut punitionis directæ non habet. Itaque Decius Magius Campanus ab Annibale vinctus et Cyrenas delatus, atque inde deportatus Alexandriam, docuit contra jus fœderis vinctum se ab Annibale esse: atque ita vinculis liberatus est.

Liv. xxiii. 7.

5 Secunda specie jus habet socius cogendi socium, ut stet fœderis legibus, atque etiam puniendi, ni steterit. Sed hoc quoque inæquali fœderi proprium non est. Idem enim locum habet in fœdere æquali. Nam ut quis ultionem sumat ab eo qui peccavit, satis est, ut ipse ei qui peccavit subditus non sit; quod alibi a nobis tractabitur. Quare etiam inter reges aut populos non fœderatos idem usu venit.

temporis a Romanis dicebantur *Fœderati* et *Liberi*, precariam tantum *atropiar* et libertatem habuisse, ac re vera subjectos et obnoxios fuisse. Id

inculenter demonstravit vir Illustrissimus, EZECHIEL SPANHEMIUS. *Orb. Rom. Exercit. II. cap. x. J. B.*

bound either to punish the offender, or to give him up to the party whom he has wronged; but this holds good, not only in unequal, but in equal alliances, and even when there is no league in existence, as we shall hereafter shew. They are also bound to see that compensation be made, which was the office of the *Recuperatores* at Rome. [See the definition of *Recuperatio* from Festus.] But one of the allied states has not a direct Right of seizing or punishing the subject of another. So when Annibal seized Decius Magius the Campanian, he pleaded against this as contrary to the federal Rights, and was set at liberty.

5 In the second case, one ally has the power of compelling another to abide by the terms of the league, and even of punishing, if this be not done. But this also is not peculiar to unequal alliances; for the same holds in an equal alliance. For in order to justify any party in doing himself justice upon a wrong-doer, it is sufficient that he be not himself the subject of the offender; a case elsewhere to be

6 Tertia specie sicut in fœdere æquali solent controversiæ deferri ad ⁵conventum sociorum, quos scilicet res non tangit, ut Græcos, Latinos veteres, et Germanos olim fecisse legimus; aut alioqui ad arbitros, aut etiam ad principem fœderis tanquam communem arbitrum: ita in fœdere inæquali plerumque convenire solet, ut controversiæ disceptentur apud eum, qui superior est in fœdere. Quare ne hoc quidem ostendit imperii potestatem. Nam et reges apud iudices a se constitutos iudicio contendere solent.

7 In postrema specie jus cognoscendi nullum est sociis. Ideo cum Herodes quædam adversus liberos ad Augustum sua sponte deferret, dixerunt illi: *Poterat de nobis supplicium sumere tuo jure, tum qua pater, tum qua rex.* ^h Et Scipio, cum Romæ a Carthaginiensium quibusdam Annibal accusaretur, dixit non oportere se Patres Conscriptos reipublicæ Carthaginiensium interponere. Et hoc est, in quo Aristoteles ait societatem a civitate differre, quod sociis curæ sit, ne injuria in ipsos committatur, non vero ne sociæ civitatis cives inter se injurias committant.

8 Solet et illud objici, quod in historiis ei qui fœdere superior est imperandi, et ei qui inferior est parendi vox interdum tribuitur. Sed nec hoc movere nos debet: aut enim agitur de rebus ad commune bonum societatis pertinentibus, aut

Joe. xvi. 4.
§ 3.

Val. Max. iv.
cap. i. n. 6.
[Liv. xxviii.
47. c.]
Pol. iii. 2.

⁵ *Conventum sociorum*] Talis conventus vocatur *κοινὸδικιον* in vetere columna *ισπολιτείας* sive communicatæ civitatis Priansiorum et Hieropotamiorum. [Immo Hierapytniorum, ut ha-

bet Inscriptio, primum edita a J. Priamo, not. in Apuleii *Apolog.* pag. 59, et seqq. postea inter *Marmora Oxoniensia*, pag. 116, et seqq. Vide et *Orbem Romanum* III. SPANHEMII, I. 4 et II. 16,

treated. And therefore this is practised between kings and peoples not federate.

6 In the third case, as, in equal alliances, the dispute is commonly referred to a convention of the allies who are not interested in the dispute, as we read that the Greeks, antient Latins, and Germans used to do; or otherwise, to arbiters, or to the Head of the League as a common arbiter: so, in unequal alliances, it is commonly agreed that disputes are to be settled by reference to him who is the superior in the alliance. But this also does not prove superior authority; for even kings are accustomed to have pleas before judges appointed by themselves.

7 In the fourth case, the allies have no Right of Cognisance. So when Herod made accusations against his sons to Augustus, they pleaded that he himself, both as father and as king, had cognisance of

de utilitate privata ejus, qui superior est in fœdere. In rebus communibus, extra tempus conventus, etiam ubi fœdus æquale est, solet is, qui lectus est princeps fœderis (נָגִיד הַבְּרִית Daniel. xi. 22) sociis imperare, ut Agamemnon regibus Græcis, Lacedæmonii Græcis postea, deinde Athenienses. In oratione Corinthiorum apud Thucydidem legimus: *χρή τοὺς ἡγε-* Cap. 120.
μόνας τὰ ἴδια ἐξ ἴσου νέμοντας, τὰ κοινὰ προσκοπεῖν, De-
cet eos, qui fœderis principes sunt, circa suas quidem
utilitates nihil præcipuum sumere, at in communibus rebus
curandis eminere supra ceteros. Isocrates veteres Athenien- Panegyrr. p. 62 c.
ses ductum exercuisse ait, ὅλων ἐπιστατούντας, ἰδίᾳ δ' ἐκά-
στους ἐλευθέρους ἐὼντας εἶναι· curam gerentes pro sociis
omnibus, sed ita ut iis libertatem integram relinquerent.
 Et alibi: *στρατηγεῖν οἰομένους δεῖν, ἀλλὰ μὴ τυραννεῖν, ita* Ibid. p. 58 n.
ut imperium habere belli, non dominari se debere censerent.
 Item: *συμμαχικῶς, ἀλλ' οὐ δεσποτικῶς βουλευομένους περὶ* Ibid. p. 62 c.
αὐτῶν, socialiter, non heriliter res eorum curantes. Hoc
 ipsum Latini imperare, Græci modestius *τάσσειν* dicunt.
 Athenienses delato sibi ductu belli in Persas, *ἔταξαν*, inquit
 Thucydides, *ἃς τε ἔδει παρέχειν τῶν πόλεων χρήματα πρὸς* Lib. I. 96.
τὸν βάρβαρον καὶ ἃς ναῦς· ordinarunt (sic qui Roma in Græ-
 ciam mittebantur, dicebantur mitti ¹ad ordinandum statum
 liberarum civitatum) *quæ urbes pecunias in barbarum, quæ*

p. 426. J. B.]

¹ Et Scipio] Vide Polybium in le-
 gationum excerpto cv.

² Immo rerum omnium : est enim in
 Græco *πραγμάτων*, ab Auctore omis-

sum, qui ne quidem Orationem, ubi
 hæc omnia leguntur, indicabat. J. B.

¹ Ad ordinandum statum liberarum
 civitatum] Plinius *epistolarum* VIII. 24.

them. - So when some of the Carthaginians complained to Rome against Annibal, Scipio said that the Senate ought not to interfere in the interior matters of Carthage. And so Aristotle says that an Alliance differs from a single State in this; that Allies provide against their own mutual injuries, but not against the mutual injuries of the citizens of one of the Allied States.

8 In unequal alliances, the words *command* and *obedience* are sometimes used with reference to transactions between the superior and inferior: but this does not refute what we have said. Such terms are either used of things tending to the common good of the alliance, or to the private advantage of the superior.

In common things, at times when the common convention is not assembled, the Head of the League usually gives commands to the allies; as Agamemnon to the Greek kings; and the Lacedæmonians,

Lib. xxxvii.
54.

naves conferrent. Hoc enim si facit, qui princeps tantum est in fœdere, non mirum est si in fœdere inæquali idem faciat is, qui superior est fœdere. Imperium ergo hoc sensu, id est, ἡγεμονία, libertatem aliorum non tollit. Rhodii in oratione apud Senatum Romanum, quæ apud Livium exstat: *Græci domesticis quondam viribus etiam imperium amplectebantur: nunc imperium ubi est, ibi ut sit perpetuum optant: libertatem vestris tueri armis satis habent, quoniam suis non possunt.* Sic post Cadmeam a Thebanis receptam narrat

Lib. xv. p. 471.

Diodorus multas civitates Græcas convenisse πάσας ὑπάρχειν αὐτονόμους, ἡγεμόσι χρωμένους ἀθηναίους, omnes ut liberæ essent, sed Atheniensium ductu uterentur. De ipsis Atheniensibus Philippi Macedonis tempore Dion Prusæensis: ὅτε τῆς ἡγεμονίας παρακεχωρήκασι, τῆς δ' ἐλευθερίας μόνης λοιπὸν ἀντείχοντο: quo tempore ductu belli omisso libertatem solam retinebant. Sic Cæsar quos sub imperio Suevorum fuisse dicit, eosdem mox socios nominat.

Orat. 31. æv.
Rhodiæ. p.
380 A.De Bell. Gall.
v. 39.

9 In iis vero rebus, quæ ad propriam utilitatem spectant, superioris postulata solent imperia dici, non ex jure, sed ex effectus similitudine, sicut regum preces imperia sæpe esse dicuntur, et ægroti imperare medicis. Livius, Lib. xlii: *Ante*

Cap. 1.

* Sub umbra fœderis] Hoc ipsum est quod Arato Plutarchus dicit, (pag. 1045 A.) συμμαχίαν ὑποκοπιέσθαι. molle servitium, Vocula apud Tacitum *Historiarum* iv. (c. 87.) Festus Rufus de Rhodiis: *Primum libere agebant,*

postea in consuetudinem parendi, Roman's clementer provocantibus, pervererunt. (Cap. 10. Ed. Cell.) Cæsar, quos in Æduorum amicitia fuisse prius dixerat et clientes vocarat, post sub imperio fuisse memorat. [Bell. Gall. vii. 75.]

and afterwards the Athenians, to the Greek States. [See Thucydides and Isocrates.] The Latins call this *commanding*; (*imperare*;) the Greeks, more modestly, *ordering*; (ράσσειν.) [See Thucydides, Pliny.] This being done by the Head of an equal Alliance, may naturally be done by the Superior in an unequal Alliance. This kind of *imperium*, ἡγεμονία, does not take away liberty. So the Rhodians say in Livy: so the Greek cities are described in Diodorus; so Dio Prusæensis says of the Athenians; so Cæsar of the Suevi.

9 In matters relating to the utility of the Superior in an unequal alliance, his requirements are called *commands*, not of Right, but as producing the effect of commands: as the requests of kings are often called commands; [so Livy] and as the patient is said to command his physician [more commonly the physician is said to command the patient. J. B.]

10 But yet, true it is, that he who is superior in an alliance, if he be much the more powerful, often gradually obtains a real *imperium*,

hunc consulem (L. Posthumium) nemo unquam sociis in ulla re oneri aut sumptui fuit: ideo magistratus mulis, tabernaculis, et omni alio instrumento militari ornabantur, ne quid tale imperarent sociis.

10 Interim verum est accidere plerumque, ut qui superior est in fœdere, si is potentia multum antecellat, paulatim imperium proprie dictum usurpet: præsertim si fœdus perpetuum sit, et cum jure præsidia inducendi in oppida, sicut Athenienses fecerunt, cum a sociis ad se provocari passi sunt, quod nunquam fecerant Lacedæmonii: quibus temporibus Isocrates Atheniensium imperium in socios regno comparat. Sic Latini querebantur, ^{Orat. de Pace, p. 162. [Liv. viii. 4. a.]} sub umbra fœderis Romani servitutem se pati. [Dion.] Hal. vi. Sic Ætoli vanam speciem et inane nomen libertatis: Achæi ^{Liv. xxxiv. 23. [xxxv. 39.]} postea, *fœdus specie jam esse precariam servitutem.* Sic apud Tacitum Civilis Batavus de iisdem Romanis conqueritur; ^{Hist. iv. 14.} *neque enim societatem, ut olim, sed tanquam mancipia haberi: et alibi: Miseram servitutem falso pacem vocari.* ^{Ibid. 17.} Eumenes quoque apud Livium Rhodiorum socios ait, verbo ^{xxxvii. 53.} esse socios, revera subjectos imperio et obnoxios: Magnes ^{Liv. xxxv. 31.} et quoque in speciem liberam Demetriadem, ^{Idem.} *revera omnia ad*

Adde, si libet, Fredericum Mindanum *de Processibus*, Lib. II. cap. xiv. n. 3: Zieglerum (*ad auream præxim Calvoti*) § Landassii, num. 86: Gaillium libro II. observatione LIV. num. 6. Vide Agathiam libro I. ubi monentur Gothi, quid a Francis cum tempore expectan-

dum habeant. (Cap. II.)

¹ *Revera omnia ad nutum Romanorum fieri* Tales et Lazi Justiniani temporibus. Vide Procopium *Persicorum* II. [c. 15. *Adi Illustr.* Ezech. Spanhemii *Orbem Roman.* Exerc. II. c. 17. pp. 447, 448. J. B.]

especially if the alliance be perpetual, with the Right of introducing garrisons into the towns; as the Athenians did when they allowed appeals to be made to them by their allies, which the Lacedæmonians never did; at which time Isocrates compares the power of the Athenians to an empire. So the Latins complained that under the figment of an alliance with Rome they were in slavery. So the Etolians spoke of the vain pretence and empty name of liberty; and the Achæans afterwards, that the alliance was a slavery, having no security of liberty. So Civilis, in Tacitus, complains that it was not an alliance, as formerly, but that they were treated like slaves; and again, that their wretched slavery was falsely called peace. Eumenes, in Livy, says that the allies of the Rhodians were allies in name only; in reality, subjects and under command: and the Magnesians say that Demetrius, free in appearance, is really at the beck of the Romans; and Polybius says that the Thessalians, in pretence free, were really under the power of the Macedonians.

Hist. iv. 76. nutum Romanorum fieri. Sic Thessalos in speciem fuisse liberos, sed revera sub imperio Macedonum notat Polybius.

11 Hæc cum fiunt, et ita fiunt ut potentia in jus transeat, qua de re alibi erit disputandi locus, tunc aut qui socii fuerant fiunt subditi, aut certe partitio fit summi imperii, qualem accidere posse supra diximus.

Lib. i. § 19. XXII. ^m Qui vero certum quid pensitant aut ad redimendas injurias, aut ad tutelam comparandam, *σύμμαχοι φόρου ὑποτελεῖς*, ut est apud Thucydidem: quales ⁿ Hebræorum reges, et vicinarum gentium post Antonii tempora, *ἐπὶ φόροις τεταγμένοις*, ut Appianus loquitur: quo minus summum imperium habere possint, nullam dubitandi causam video, quanquam infirmitatis confessio de dignitate aliquid delibat.

Bel. Cfu. v. p. 716.

XXIII. 1 Difficilior multis videtur quæstio de nexu

^m Qui vero certum quid pensitant] Persæ pecuniam annuam ab Justiniano accipiebant, qua de re vide Procopium *Persicorum* II. (cap. 10) et *Gothicorum* IV. (cap. 16) id molli vocabulo vocabatur stipendium ad tutandas portas Caspias. Turcæ Arabas montanos pecunia placent.

ⁿ Hebræorum reges] Josephus, Lib. XV. οὐ γὰρ ἔφη καλῶς ἔχειν Ἀντώνιος βασιλεία περὶ τῶν κατὰ τὴν ἀρχὴν γεγενημένων εὐθύνas ἀπαιτεῖν. οὕτως γὰρ ἂν οὐδὲ βασιλεὺς εἴη· δόντας δὲ τὴν τιμὴν καὶ τῆς ἐξουσίας αὐτεξουσιάζοντας, ἔαν αὐτῇ χρῆσθαι. [Locus

est cap. III. § 8. *Ed. Hudson.* ubi pro *αὐτεξουσιάζοντας*, ut heic scribitur, est *καταξιώσαντας*, etiam in veteri edit. *J. B.*] *Negabat Antonius rectum esse, regem vocari ad rationes reddendas de iis, quæ ut rex fecisset: ita enim ne regem quidem eum fore. Par esse, ut qui bonorem ei dederint, etiam potestate quam liberrime uti eum sinant.* Chrysostomus II. de *Eleemosyna*: ἐπειδὴ τὰ τῶν Ἰουδαίων μετέπεισε πράγματα καὶ λοιπὸν ἐπὶ τὸν Ῥωμαίων ἐτέθησαν ἀρχὴν, οὕτε αὐτόνομοι ἦσαν, καθάπερ καὶ πρότερον, οὕτε καθόλου δοῦλοι, καθάπερ καὶ νῦν. ἀλλ' ἐν τάξει συμ-

11 When this happens, and such Power becomes a Right, a case which we shall have to treat hereafter, then those who had been Allies become Subjects; or at least there is a partition of the Sovereignty; which, as we have above said, may take place in certain circumstances.

XXII. The payment of money to the Superior does not destroy Sovereignty; whether it be a compensation for injury done, or a consideration for protection. Such cases happened among the Greeks; and to the kings of the Hebrews and of the neighbouring nations after the time of Antonius: but such payment is a confession of weakness, and may derogate something from the dignity of the State which makes it.

XXIII. 1 The question of the Feudal Relation is more difficult; but it may be easily solved by what precedes. This contract is peculiar to the German nations, and is nowhere found except where the Germans have established themselves. In it two things are to be

feudali, sed quæ ex antedictis facile solvi potest. Nam in hoc contractu, qui proprius est Germanicarum Gentium, neque usquam invenitur, nisi ubi Germani sedes posuerunt, duo sunt consideranda, obligatio personalis, et jus in rem.

2 Obligatio personalis eadem est, sive quis ipsum jus imperandi, sive aliud quidvis etiam alibi situm feudi jure possideat. Talis autem obligatio sicut privato non erat demtura jus libertatis personalis, ita nec regi aut populo jus demit summi imperii, quæ libertas est civilis. Quod apertissime conspici datur in feudis liberis, quæ Franca vocant, ¹quæ nullo jure in rem, in sola personali obligatione consistunt. Hæc enim nihil sunt aliud quam species fœderis inæqualis, de quo egimus, quo alter alteri operam pollicetur, alter alteri præsidium et tutelam. Pone etiam adversus omnes promissam

μάχων ὄντες διατέλουν, φόρους μὲν
τελοῦντες τοῖς βασιλεῦσιν ἑαυτῶν·
καὶ τοὺς παρ' ἐκείνων ἀρχοντας δεχόμενοι.
Τάλλαχού δὲ τοῖς ἰδίους κα-
χρημένοι νόμοις, καὶ τοὺς παρ' αὐτοῖς
ἀμαρτάνοντας κατὰ τὰ πάτρια κολά-
ζοντες νόμιμα· *Judæi, ex quo retro
ferri res eorum capere, Romano attributi
imperio, neque in plena, ut ante,
erant libertate: neque tamen ita, ut nunc,
omnino servi, sed sociorum vocabulo
honorabantur, regibus suis tributa pen-
dentes, et ab iis accipientes præfectos.
Ceterum in plerisque suis utebantur legibus,
ita ut et popularium delinquentes*

ipsi punirent secundum mores patrios.
Tom. vi. pag. 818. *Ed. Savil.* Heic autem,
ubi est, τοῖς βασιλεῦσιν ἑαυτῶν legendum
αὐτῶν: quemadmodum recte observavit
DESID. HERALDUS, *De Rerum*
judicat. auctor. Lib. ii. cap. 16, num.
11. Res ipas, et series orationis, docent,
agi, non de Regibus Judæorum, sed de
Imperatoribus Romanis, qui βασιλεῖς
Græcis dicebantur, et quibus Judæi tunc
temporis tributa pendebant.]

¹ Confundit Auctor *Feuda libera*
cum certis quibusdam pactis, quæ improprie
Feudorum nomine adpellatasunt ob
similitudinem quamdam in exhibi-

considered, the Personal Obligation, and the Right of Real Property.

2 The Personal Obligation is the same, whether any one [the Superior Lord] by the Feudal Law possesses the Right of Command, or any other Right, over a thing situated at a distance from him. As such an Obligation would not take away the Right of personal liberty [in the person subject to such command], so neither does it take away from a king or a people the Right of Sovereignty, which is civil liberty. This is most apparent in those Free Fiefs which are called *Frank Fiefs*, which consist solely in the Personal Obligation, without any Right to Real Property. For these are only a kind of unequal alliance, such as we have spoken of; in which one party promises to the other aid, [for instance, Military Service,] and the other party promises Protection and Guardianship. Even if the condition be aid promised [by the Vassal] against every other party, which is

operam, °quod nunc feudum ligium vocant, (nam olim ea vox latius patebat) nihil id de jure summi imperii in subditos detrahit: ut jam taceam semper inesse conditionem tacitam, dum justum sit bellum, de qua agendum erit alibi.

3 Jus vero in rem quod attinet, id quidem tale est, ut ipsum imperandi jus, si feudi jurè teneatur, aut familia extincta, aut etiam ob certa crimina amitti possit. Sed interim summum esse non desinit: aliud enim est res, ut sæpe diximus, aliud rem habendi modus. Et tali jure multos video reges a Romanis constitutos, ita scilicet, ut deficiente regia familia imperium ad ipsos rediret, quod de Paphlagonia aliisque nonnullis Straboni notatum.

XXIV. Distinguendum quoque non minus in imperio quam in dominio jus ab usu juris, sive actus primus ab actu secundo. Nam sicut rex infans jus habet, sed imperium exercere non potest: sic et furiosus, et captivus, et qui in alieno territorio ita vivit, ut actiones circa imperium alibi situm liberæ

tione honoris. Ostendimus id in Gallicis nostris ad hunc locum notis. Videri potest etiam G. DANIELIS, e Soc. Jes. Opus Gallicum *De Militia Francica*, Tom. I. pag. 106, et seqq. Edit.

Amstel. 1724. J. B.

• *Quod nunc feudum ligium vocant*
Vide Baldum *Procmio Digestorum*,
Nattam consilio CCCCLXXXV.

what is now called a *Liege Fief*, that does not detract anything from his [the Vassal's] sovereignty; not to mention that there is always included a tacit condition, that the war be just; which we shall treat of elsewhere.

3 As to the Right of Real Property [belonging to the Feudal Vassal], that is doubtless such, that the Right of Command, if it be held in virtue of the Fief, may be lost by the extinction of the Tenant's family, and also for certain crimes. But in the mean time it does not cease to be Sovereign; for, as we have repeatedly said, (§ XI. 1) we must distinguish between what a thing is, and the kind of possession of it. And we find that many kings were established by the Romans on that condition, that if their family failed, the authority should revert to the Romans; as in Paphlagonia.

XXIV. And thus in political authority, as in private property, we must distinguish Right from the use of Right; or [in the language of the Schoolmen] the *actus primus* from the *actus secundus*. A king who is an infant has the Right, but cannot exercise it; so one who is insane, captive, or who lives in the territory of another so that his actions with regard to the exercise of his remote kingdom are not freely done. In all these cases there are to be established Guardians

ei non permittantur; omnibus enim his casibus curatores sive prodici dandi sunt. Itaque ^pDemetrius, cum in potestate Seleuci non satis libere viveret, vetuit aut sigillo aut literis suis credi, sed omnia quasi se mortuo administrari voluit.

^p *Demetrius*] Vide Plutarchum *Demetrio*. (pag. 914 D. *Ed. Weck.*)

or Regents. So Demetrius, when he was living under constraint in the power of Seleucus, forbad that credence should be given to his Seal or his Letters, and directed every thing to be administered as if he were dead.

CAPUT IV.

DE BELLO SUBDITORUM IN SUPERIORES.

- | | |
|--|---|
| <p>I. <i>Status quæstionis.</i></p> <p>II. <i>Bellum in superiores, quales, ordinarie licitum non esse jure naturæ.</i></p> <p>III. <i>Nec concessum lege Hebræa.</i></p> <p>IV. <i>Minus etiam lege Evangelica: quod probatur ex sacris literis.</i></p> <p>V. <i>Et factis Christianorum veterum.</i></p> <p>VI. <i>Refellitur sententia statuens inferioribus magistratibus licitum esse bellum adversus summam potestatem: idque rationibus et sacris literis.</i></p> <p>VII. <i>Quid sentiendum, si summa et alioqui inevitabilis sit necessitas?</i></p> <p>VIII. <i>Jus belli dari posse in principem populi liberi.</i></p> <p>IX. <i>In regem, qui imperium abdicaverit.</i></p> <p>X. <i>In regem, qui regnum alie-</i></p> | <p><i>net, ad impediendam traditionem tantum.</i></p> <p>XI. <i>In regem, qui manifeste totius populi hostem se ferat.</i></p> <p>XII. <i>In regem post amissum regnum ex lege commissoria.</i></p> <p>XIII. <i>In regem, qui partem duntaxat imperii habeat, pro ea parte, quæ ipsius non sit.</i></p> <p>XIV. <i>Si resistendi libertas certis casibus reservata sit.</i></p> <p>XV. <i>Invasori alieni imperii quatenus parendum.</i></p> <p>XVI. <i>Invasori alieni imperii vi resisti posse ex jure belli manentis.</i></p> <p>XVII. <i>Ex lege antecedente.</i></p> <p>XVIII. <i>Ex mandato jus imperandi habentis.</i></p> <p>XIX. <i>Cur extra hos casus id non liceat.</i></p> <p>XX. <i>In controverso jure privatos sibi judicium sumere non debere.</i></p> |
|--|---|

I. 1 **B**ELLUM gerere possunt et privati in privatos, ut viator in latronem; et summum imperium habentes in eos, qui itidem id habent, ut David in regem Ammonitarum; et privati in eos, qui imperio summo, at non in se, utuntur, ut Abrahamus in regem Babylonæ et vicinos; et qui summum imperium habent in privatos aut sibi subditos, ut

CHAPTER IV. *Of the war of Subjects against Superiors.*

I. 1 War may be carried on by private persons against private persons, as by a traveller against a robber; and by sovereigns against sovereigns, as by David against the king of the Ammonites; and by private persons against those who are sovereigns of others, but not of them, as by Abraham against the king of Babylon and his neighbours; and by Sovereigns against private persons, either their own subjects, as

David in partem Isbosethi, aut non subditos, ut Romani in piratas.

2 Tantum illud quæritur, an aut privatis aut publicis personis bellum gerere liceat in eos, quorum imperio sive summo sive minori subsunt? Ac primum id minime controversum est, arma sumi posse in inferiores ab iis, qui summæ potestatis auctoritate armantur: qualis fuit Nehemias armatus edicto Artaxerxis adversus vicinos regulos. Sic metatores expellendi domino prædii licentiam Imperatores Romani concedunt. Verum adversus summam potestatem aut inferiores, sed agentes quod agunt summæ potestatis auctoritate, quid liceat quæritur.

*L. Devotum.
C. de Metatoribus. Lib.
xii. leg. 5.*

3 Illud quidem apud omnes bonos extra controversiam est, si quid imperent naturali juri aut divinis præceptis contrarium, non esse faciendum, quod jubent. Nam Apostoli cum dixerunt Deo magis quam hominibus obediendum, ad certissimam provocarunt regulam, omnium inscriptam mentibus, quam totidem ferme verbis expressam apud Platonem reperias: at si qua ex tali causa, aut alioqui quia summum imperium habenti ita libet, injuria nobis inferatur, ea toleranda est potius, quam vi resistendum.

*Apol. Socrat.
p. 29 D.*

by David against the party of Ishbosheth, or not their own subjects, as by the Romans against the pirates.

2 But we have now to inquire only whether it be lawful either for private or for public persons to carry on war against those who have over them an authority either sovereign or subordinate.

And in the first place, it is not controverted that those who are armed with the authority of the supreme power may take arms against inferior authorities; as was the case when Nehemiah was armed with the edict of Artaxerxes against the chiefs of the neighbouring country. So the Roman emperors concede to the owner of the soil the liberty to expel those who would lay down the lines of a camp there.

But we inquire what is lawful against the supreme power, or inferior powers acting under the authority of the supreme power.

3 It is beyond controversy among all good men, that if the persons in authority command any thing contrary to Natural Law or the Divine Precepts, it is not to be done. For the Apostles, in saying that we must obey God rather than man, appealed to an undoubted rule, written in the minds of all, which you may find, almost in the same words, in Plato. But if we receive any injury from such a cause, or in any other way from the will of the Supreme Power, we are to bear it rather than resist by force.

II. 1 Et naturaliter quidem omnes ad arcendam a se injuriam jus habent resistendi, ut supra diximus. Sed civili societate ad tuendam publicam tranquillitatem instituta, statim civitati jus quoddam majus in nos et nostra nascitur, quatenus ad finem illum id necessarium est. Potest igitur civitas jus illud resistendi promiscuum publicæ pacis et ordinis causa prohibere: Et quin voluerit, dubitandum non est, cum aliter non posset finem suum consequi: ¹nam si maneat promiscuum illud resistendi jus, non jam civitatis erit, sed dissociata multitudo, qualis illa Cyclopum:

Hom. *Odyss.*
ix. v. 114.

Θεμιστεύει δ' ἕκαστος
Παίδων ἧδ' ἀλόχων.

Dant conjugibus jus
Quisque suis sobolique.

Eurip. *Cyclop.*
v. 130.

Νομάδες· ἀκούει δ' οὐδὲν οὐδὲς οὐδένος.

^a Confusa turba, nemo ubi audit neminem.

Bell. Catil. 6. Et Aboriginum, qui Sallustio tradente, genus hominum agreste, sine legibus, sine imperio, liberum atque solutum: et apud eundem alio loco Getuli, qui neque moribus, neque lege aut imperio cujusquam regebantur.

Jugurth.
[[18]].

2 Ita, ut dixi, habent mores omnium civitatum: *Generale pactum est societatis humanæ*, inquit Augustinus, *regibus obedire*. *Æschylus*:

Confess. III. 2
Prom. Vinct.
[[v. 324]].

¹ Distinguendum heic inter injurias *dubias aut tolerabiles, et manifestas ac intolerandas*. Quæ prioris generis sunt, eas pati quisque debet, non propter Principem, qui ne quidem minimam injuriam inferendi jus habet, sed ne societas civilis turbetur. Posterioris autem generis nemo pati tenetur, easque repelli finis ipse civitatum constitutarum

postulat, tantum abest ut vetet. Quæ de re plenius dicemus in nostris ad hoc Caput Notis Gallicis. Heic monuisse sufficiat. *J. B.*

^a *Confusa turba, nemo ubi audit neminem*] *De Bebryciis similia prodidit* Valerius (*Argon.* iv. 102):

non fœdera legum
Ulla colunt, placidas aut jura tenentia mentes.

II. 1 By Natural Law, all have the Right of repelling wrong. But civil society being instituted to secure public tranquillity, the State acquires a Superior Right over us and ours, as far as is necessary for that end. Therefore the State may prohibit that promiscuous Right of resisting, for the sake of public peace and order: and it is to be presumed to have intended this, since it cannot otherwise attain its end. If this prohibition does not exist, there is no State, but a multitude without the tie of society. So the Cyclops are described by Homer and Euripides; so the [hypothetical] Aborigines, and the Getuli, by Sallust. [See the references.]

Τραχὺς μόναρχος κοῦχ ὑπεύθυνος κρατεῖ.

Rex est suo utens jure, nulli obnoxius.

Sophocles [*In Ajac.* ver. 668] :

Ἄρχοντες εἰσω, δεῖθ' ὑπεικτέον. τί μή;

Nam principes sunt: obsequendum: quippe ni?

Euripides [*Phoeniss.* ver. 393] :

Τὰς τῶν κρατούντων ἀμαθίας χρεῶν φέρειν.

Imperia habentum perferenda inscitia est.

Adde quod supra ex Tacito in hanc rem adduximus: cujus et hoc est; *Principi summum rerum arbitrium Dii dederunt*, Ann. vi. 8. *subditis obsequii gloria relicta est.* Hic quoque²:

Indigna digna habenda sunt, rex quæ facit.

Seneca: *Æquum atque iniquum regis imperium feras*:

Medea, v. 196.

Quod ex Sophocle sumtum, qui dixerat [*Antigon.* ver. 667] :

Ἄλλ' ὃν πάλιν στήσεις, τοῦδε χρὴ κλύειν

Καὶ σμικρὰ καὶ δίκαια καὶ τάναντία.

Et quod apud Sallustium est: *Impune quidvis facere, id est regem esse*³.

3 Hinc ubique majestas, id est, dignitas, sive populi, sive unius, qui summo fungitur imperio, tot legibus, tot pœnis defenditur: quæ constare non potest, si maneat resistendi licentia. Miles qui castigare volenti se centurioni restiterit,

L. Miltia. 13.
§ Irreverens.
4. D. dere mil.
Rufus de
legibus milit.
tribus. 16.

² Parodia versus Plantini: *Indigna digna habenda sunt, herus quæ facit.*

Captiv. II. 1. 6. J. B.

³ *Impune quidvis facere, id est, regem esse*] Pertinent huc M. Antonii verba, quæ ex Josepho modo adduximus. (Cap. præced. § 22).

⁴ Verba sunt Memmii, Tribuni Plebis, qui loquitur tantum de more Regum, et

impunitate facti, non juris: quam ipsis nequaquam largiturus erat libertatis vindex acerrimus. Inspice totum locum, *Bell. Jugurth.* c. 36. Si alia loca congesta expendantur, nil aliud in plerisque reperietur, immo aliquando contrarium ejus, quod inde Auctor colligit, J. B.

2 Such a prohibition of force, then, is the usage of all society. *It is the general pact of human society*, says Augustine, *to obey kings.* So Æschylus, Sophocles, Euripides, Tacitus, Seneca, who took it from Sophocles, and Sallust. [See the passages. The line *Indigna digna habenda sunt, rex quæ facit*, is a parody of a line in Plautus, *rex* being put for *herus.* *Captiv.* II. 1. 6. J. B.]

3 Hence the majesty, that is, the dignity of the Sovereign, whether he be king or people, is defended by so many laws, so many penalties. The soldier, who, when the centurion has to scourge him, resists and seizes the vine-stalk (the instrument of punishment), is cashiered; if

Edic. Nic.
v. 8.

si vitem tenuit, militiam mutat: si ex industria fregit, vel manum centurioni intulit, capite punitur: Et apud Aristotelem est, *εἰ ἀρχὴν ἔχων ἐπάταξεν, οὐ δεῖ ἀντιπληγῆναι, εἰ magistratum gerens aliquem verberavit, reverberandus non est.*

Deut. xvii. 12.
Jos. i. 18.

1 Sam. viii. 11.

Deut. xvii. 14.

L. Jus Pluri-
bus D. de
Just. et Jure.
ii.

III. In lege Hebræa mortis supplicio damnatur, qui inobediens fuerit aut summo pontifici, aut ei qui extra ordinem rector populi a Deo esset constitutus. Quod vero apud Samuelem est de jure regis, omnino recte insipienti apparet, nec de jure vero intelligendum, id est, de facultate honeste et juste aliquid agendi, (longe enim alia vivendi ratio præscribitur regi in ea parte legis, quæ est de officio regis) neque nudum ⁴factum indicari: nihil enim esset in eo eximium, cum injurias facere etiam privati privatis soleant: sed factum quod effectum aliquem juris habeat, id est, ^cnon resistendi obligationem. Ideo additur, populum pressum istis injuriis Dei opem imploraturum, quia scilicet humana remedia nulla exstarent. Sic ergo hoc jus vocatur, quomodo prætor jus reddere dicitur, etiam cum inique decernit.

IV. 1 In novo fœdere Christus præcipiens dari Cæsari, quæ Cæsaris sunt, intelligi voluit a suæ disciplinæ sectator-

⁴ Immo *jus Regis* apud SAMUELEM significare tantum *consuetudinem Regum*, probantur Interpretes exemplis et rationibus omni exceptione majoribus. Diximus in Gallicis nostris Notis. *J. B.*

^c *Non resistendi obligationem*] Philo in Flaccum [pag. 978 v. Ed. Paris.]: *πότε γὰρ εἰς ἀπόστασιν ὑποπτεύθημεν; πότε δ' οὐκ εἰρηνικοὶ πᾶσιν ἐνομήσθημεν; τὰ δ' ἐπιτηδεύματα, οἷς καθ'*

he breaks it on purpose, or lays a hand on the centurion, his offence is capital. And Aristotle says, *If a magistrate strikes any one, the blow is not to be returned.*

III. So in the Hebrew law, he was condemned to death who was disobedient either to the high priest, or to a Ruler of the people, appointed by God in an extraordinary manner. The passage 1 Sam. viii. 11, [*This will be the manner of the king over you: He will take your sons, &c.*] if carefully examined, appears not to imply a true Right, (for a very different course of conduct is prescribed in the law when the duty of the king is spoken of;) nor a mere Fact; (for the fact of a king doing this would not be peculiar, since some private persons also do injuries to others;) but a Fact which has a peculiar effect, that this being done by the king, there is an obligation of not resisting. And therefore it is added that the people so oppressed shall cry out to God for help, namely, because no help of man is to be had. So that this exercise of power is called the king's *Right*, as the judge is said to do *Right* to the parties, even when he judges wrong.

ibus non minorem, si non majorem, obedientiam cum patientia (si opus sit) conjunctam summis potestatibus deberi, quam ab Hebræis regibus Hebræis debebatur: quod latius exsequens optimus ejus interpret Paulus Apostolus, officia subditorum late describens, inter alia, *Qui obsistit, inquit, potestati, Dei ordinationi obsistit: tum vero qui obsistunt, sibi ipsis condemnationem accipient.* Addit mox, *Dei enim minister est, qui potestate fungitur tuo bono.* Deinde, *Quapropter necesse est subjici, non solum propter iram, sed et propter conscientiam.* In subjectione includit non resistendi necessitatem, neque eam solum quæ ex formidine majoris mali oritur, sed quæ ex ipso sensu officii nostri manat, neque hominibus tantum, sed et Deo nos obligat. Rationes addit duas: primam, quod Deus ordinem illum imperandi, et parendi approbaverit, et olim in lege Hebræa, et nunc in Evangelio: quare potestates publicæ eo loco nobis habendæ sunt, quasi ab ipso Deo essent constitutæ. Nostra enim facimus, quibus auctoritatem nostram impartimur. Alteram, quod hic ordo nostro bono inserviat.

2 Atqui, dicat aliquis, injurias pati utile non est. Hic quidam, vere magis quam ad sensum Apostoli, ut arbitror,

ἐκάστην ἡμέραν χρώμεθα, οὐκ ἀντι-
ληπτα, οὐ συντείνοντα πρὸς εὐνοίαν
πόλεως καὶ εὐσταθείαν; Quando enim
defectionis suspecti fuimus? quando
non pacis amantes ab omnibus judicati

nus? instituta vero, quibus utimur
quotidie, nonne extra reprehensionem
sunt, nonne ad concordiam bonumque
statum civitatis conducunt?

IV. 1 In the New Testament, Christ, when he commands us to give to Cesar the things that are Cesar's, gives it to be understood that his disciples must pay as much obedience to the powers that be as was due from the Hebrews to the Hebrew kings; if not more; and this, joined (if need be) with endurance of evil. Paul interprets this excellently, Rom. xiii. 2 et seqq. In the subjection which he recommends, he includes the obligation of not resisting; and not only the obligation to this which arises from fear, but that which flows from a sense of duty, and is an obligation, not towards man only, but towards God. He adds two reasons; first, that God has approved the order of command and obedience, both formerly in the Hebrew Law and now in the Gospel; wherefore the public powers are to be regarded by us as if they were ordained of God; for a person makes that his act to which he imparts his authority. The other reason is, that this order promotes our good.

2 But some will say it is not for our good to suffer injuries. Here some reply, with more truth than pertinence to the apostle's meaning,

apposite, dicunt, has quoque injurias utiles nobis esse, quia ista patientia sua non sit caritura mercede. Mihi videtur Apostolus considerasse finem universalem isti ordini propositum, qui est ^dtranquillitas publica, in qua et singulorum comprehenditur. Et sane quin plerumque hoc bonum per potestates publicas consequamur, dubitandum non est: nemo enim sibi male vult: at imperantis felicitas in subditorum felicitate consistit. ^e*Sint quibus imperes*, aiebat ille. Proverbium est apud Hebræos: ^f*Nisi potestas publica esset, alter alterum vivum deglutiret*: qui sensus et apud Chrysostomum: τῶν πόλεων τοὺς ἄρχοντας ἂν ἀνέλῃς, θηρίων ἀλόγων ἀλογώτερον βιωσόμεθα βίον, δάκνοντες ἀλλήλους καὶ κατεσθίοντες, nisi rectores civitatum essent, feriorem feris viveremus vitam, non mordentes tantum, ¹sed et vorantes alios alii.

Hist. iv. 74.

3 Quod si quando nimia formidine aut iracundia aliisve affectibus transversi agantur rectores, quo minus rectam ineant viam, quæ ad tranquillitatem ducit, id inter minus frequentia habendum est; et quæ, ut ait Tacitus, interventu meliorum pensantur. Leges autem satis habent id quod ple-

^d *Tranquillitas publica*] Bene Chrysostomus: συνεργός ἐστὶ σοι, συμπράττει σοι. Princeps nimirum evangelium prædicanti. Dedolat ille quod tu descobinas.

^e *Sint quibus imperes*] Dictum hoc Sullæ aiant Plutarchus, (in Vit. Syll. p. 472) Florus, 3, 2 et alii, unde sumat Augustinus Lib. III. cap. 28. *de Civitate Dei*.

^f Legitur in Pirke Aboth, cap. III. pag. 42, *Ed. Fagii* 1641. J. B.

¹ *Sed et vorantes alios alii*] Est hoc

de statuis sexto: (Tom. VI. pag. 502. *Edit. Savil.*) sed et hoc: ἐὰν γὰρ τὰ δικαστήρια ἀνέλῃς, πᾶσαν τῆς ζωῆς ἡμῶν ἀνεῖλες τὸν εὐταξίαν. Tolle tribumalia, et omnem de vita tranquillitatem abstuleris. Deinde: [In dicta Orat. hæc non exstant.] μὴ γάρ μοι τοῦτο εἰποῖς, εἰ τις κακῶς τῷ πράγματι κέρρηκεν, ἀλλ' αὐτῆς βλέπε τῆς διατάξεως τὴν εὐκοσμίαν, καὶ τὴν πολλὴν ὄψει τοῦ ταῦτα ἐξ ἀρχῆς νομοθετήσαντος σοφίαν. Nec mihi illos refer, qui male usi sunt honoribus sed

that these injuries also are for our good, because our endurance of them will not lose its reward. To me it appears that the Apostle considered the general end which is proposed in such order, namely, the public tranquillity, in which that of individuals is comprehended. And it cannot be doubted that, for the most part, we gain this good by the public powers; for they further the happiness of the subjects for the sake of their own happiness. Hence the wish, *May there be those whom you may rule* [as Furfidius says to Sulla, Florus 3, 21]. It is a Hebrew proverb that *If there were no public power, one man would swallow another alive*: of which also Chrysostom gives the sense.

3 If the Rulers at any time are misled by excessive fear or anger, or other passions, so as to deviate from the road that leads to tran-

rumque accidit respicere, ut aiebat Theophrastus, quo et illud ^{L. τὸ γὰρ, 6. D. de Legibus III. in fine D. et pars. hered. Liv. xxxiv. 3.} Catonis pertinet: *Nulla lex satis commoda omnibus est: id modo queritur, si majori parti et in summam prodest.* Quæ autem rarius contingunt, communibus tamen regulis constringenda sunt, quia etsi ratio legis in isto speciali facto specialiter locum non habeat, manet tamen ratio in sua generalitate, cui specialia subjici fas est. Id enim satius quam sine norma vivere, aut normam cujusque arbitrio permitti. Seneca apposite ad hanc rem: *Satius erat a paucis etiam* ^{Lib. vii. de Benef. 16.} *justam excusationem non accipi, quam ab omnibus aliquam tentari.*

4 Locum et hic habere debet illa nunquam satis memorato Periclis ^{Lib. II. § 60.} apud Thucydidem sententia: *Sic existimo, etiam singulis hominibus plus eam prodesse civitatem, quæ tota recte se habeat, quam si qua privatis floreat utilitatibus, ipsa autem universim laboret: qui enim domesticas fortunas bene collocatas habet, patria tamen eversa, pereat et ipse necesse est: Contra vero, etiam si quis in beata re publica parum felix est, multo tamen facilius per illam in-*

ipseius instituti vide pulchritudinem, et sapientiam ejus admiraberis, qui primus ejus auctor fuit. Idem ad Romanos (cap. viii. vers. 5, pag. 191. Tom. III.): καὶ ἀέληε αὐτὰς (τὰς ἀρχὰς) πάντα οἰχίησεται καὶ οὐ πόλει, καὶ οὐ χωρία, οὐκ οἰκία, οὐκ ἀγορά, οὐκ ἄλλο οὐδὲν στήσεται, ἀλλὰ πάντα ἀνατραπήσεται τῶν δυνατῶν τοὺς δασυεστέροισι κατακινόντων. *Magistratus si abstuleris, perierint omnia, non urbes stabunt, non agri, non forum, nec quicquam aliud: evertentur omnia,*

et fortioris esca fiet quilibet infirmior: idem sensus apud eundem ad Ephes. v. (Tom. III. pag. 862).

§ Apud Thucydidem sententia] Lib. II. quicum bene convenit illud Ambrosii libro III. de Officiis (cap. 4): *Eadem singulorum est utilitas, quæ universorum.* Et illud in jure: *Semper non quod privatim interest unius ex sociis servari solet, sed quod societati expedit.* L. actiones. § Labeo. 65. § 5 D. Pro Socio. Adde L. unicam. § penul. c. de Caducis tollendis.

quillity, this is to be held as the less usual case, and compensated by the alternation of better times. And Laws are content to respect what commonly happens; as Theophrastus and Cato remark. [See.] Exceptional cases must submit to the general rule; for though the reason of the rule does not specially hold in that special case, yet the general reason of the rule remains; and to this special facts must be subjected. This is better than living without a rule, or leaving the rule to every one's will. So Seneca. [See.]

4 To this effect is the memorable passage in the speech of Pericles, as stated by Thucydides. Livy expresses it more briefly. So Plato, Xenophon, Jamblichus. [See.]

columis servatur. Quare cum civitas quidem singulorum possit sustentare calamitates, singuli autem publicas non item, quid est, cur non universim ipsi consulere, ipsamque tueri oporteat, nec id facere, quod vos facitis, dum quasi attoniti jactura rei familiaris, salutem proditis reipublicæ?

Lib. xxvi. 36. Quem sensum breviter ita explicat Livius: *Respublica incolumis et privatas res salvas facile præstat: publica prodendo, tua nequicquam serves.* Plato dixerat legum iv. τὸ μὲν γὰρ κοινὸν συνδεῖ, τὸ δὲ ἴδιον διασπᾷ τὰς πόλεις· καὶ συμφέρει τῷ κοινῷ τε καὶ ἰδίῳ τοῖν ἀμφοῖν, ἣν τὸ κοινὸν τιθῆται καλῶς μᾶλλον ἢ τὸ ἴδιον· quod commune est, connectit civitates, quod singulorum, dissipat; quare et publice, et privatae utilis est, ut publica magis quam privata curentur.

De Leg. ix. p. 875 A.

Xenophon vero: ὅστις ἐν πολέμῳ ὦν στασιάζει πρὸς τὸν ἄρχοντα, πρὸς τὴν ἑαυτοῦ σωτηρίαν στασιάζει· qui in bello contra ducem seditiose se gerit, facit hoc cum suæ salutis periculo. Eodem et illa Jamblichi pertinent: *Non disjuncta est privata utilitas a publica, imo in bono communi singulare etiam continetur: et ut in animalibus ceteraque natura, ita in civitatibus in totius salute salus est partium.*

De Exped. Cyr. vi. l. § 19.

Apud Stob. Serm. 46. De Magist.

5 In publicis autem præcipuum haud dubie est ordo ille, quem dixi, imperandi parendique; is vero cum privata resistendi licentia consistere nequit. Explicare libet hoc ipsum nobili Dionis Cassii loco: οὐ μὲν τοι καὶ ἐγὼ οὐτ' ἄλλως καλὸν εἶναι νομίζω ἄρχοντά τινα τῶν ἀρχομένων ἡττᾶσθαι, οὐτ' ἂν σωτήριόν τι γενέσθαι ποτέ, εἰ τὸ ταχθεὶν ὑπηρετεῖν τινί, κρατεῖν αὐτοῦ ἐπιχειρήσεις. σκέψασθε δὲ ποῖος μὲν κόσμος οἰκίας γένοιτο, ἂν οἱ ἐν τῇ ἡλικίᾳ ὄντες τῶν πρεσβυτέρων καταφρονήσωσι. ποῖος δὲ τῶν διδασκαλείων, ἂν οἱ φοιτῶντες τῶν παιδευτῶν ἀμελήσωσι. τίς ὑγίεια νοσοῦσιν; ἂν μὴ πάντα τοῖς ἰατροῖς οἱ κάμνοντες πειθαρχῶσι; τίς δ'

^a Hoc cedit vobis gratia apud Deum] Tertullianus de Penitentia: Timor hominis, Dei honor est. [Cap. 7. Sed ibi de alia plane re agitur.]

^c Præcepta illa generalia suas tamen habent exceptiones, ex natura ipsius

rei petitas. Fatetur id Auctor ipse de Servis, Lib. ii. cap. v. § 22. J. B.

^d Ames parentem, si equus est: si non, feras] Terentius Hecyra (Scen. iii. Act. i. vers. 21):

Nam matris ferre injurias me, Parmeno, pietas jubet.

5 This public order of command and obedience is inconsistent with the private license of resisting. See Dio Cassius.

6 St Peter speaks to the same effect as St Paul. So the Clemen-

ἀσφάλεια ναυτιλλομένοις, ἃν οἱ ναῦται τῶν κυβερνητῶν ἀνηκουστώσι; φύσει τε γὰρ ἀναγκαῖα τινὰ καὶ σωτήρια τῷ μὲν ἄρχειν ἐν τοῖς ἀνθρώποις, τῷ δὲ ἄρχεσθαι τέτακται. *Ego vero neque decorum existimo, ut rector civitatis cedat, neque spem esse ad salutem, si quod parere positum est velit imperare. Cogitate enim quis futurus sit ordo in familia, si a junioribus senes spernantur: quis item in scholis, si a discipulis susque deque habeantur praeceptores: unde sanitas aegrotantibus, si non per omnia medicis pareant: quid tuti navigantibus, si plebs nautica gubernantium jussa contemnat. Natura quippe id necessarium et hominibus salutare, ut alii quidem imperent, alii vero pareant.*

6 Paulo comitem addamus Petrum, cujus hæc sunt verba: *Regem honorate. Servi, subditi estote cum omni timore dominis, non solum bonis et æquis, sed etiam duris. Hoc enim cedit gratiæ, si quis propter conscientiam Dei suffert molestiam injuste afflictus: quæ enim gloria est, si peccantes et colaphis cæsi subsistitis? sed si bene agentes, et tamen male habiti subsistitis, hoc cedit vobis gratiæ apud Deum.* Confirmat mox hoc a Christi exemplo. Idemque sensus in Clementis constitutionibus his verbis exprimitur: ὁ δοῦλος εὐνοίαν φερέτω πρὸς τὸν δεσπότην μετὰ φόβου Θεοῦ, καὶ ἀσεβείας, καὶ πονηρὸς ὑπάρχη: *servus Deum timens simul bene hero suo velit, quamvis impio, quamvis injusto.* Notanda hic duo: quod dicitur subjectionem dominis deberi, etiam duris, ⁶idem ad reges quoque referendum: nam quod sequitur ei fundamento superstructum, non minus subditorum quam servorum officium respicit. Ac deinde talem a nobis requiri subjectionem, quæ injuriarum patientiam secum ferat: sicut de parentibus dici solet:

¹Ames parentem, si æquus est: si non, feras.

Et Eretriensis quidam adolescens, ⁷qui Zenonis scholam diu

Cicero *pro Cluentio*: *Non modo reticere homines parentum injurias, sed etiam æquo animo ferre oportet.* (Cap. 6). Habet ad hoc præceptum pulchra Chrysostomus tum II. *ad Timotheum*, tum libro V. *adversus Judæos*. Pertinet

huc et quæ Epictetus (cap. 65), et post eum Simplicius habent de duabus ansiis.

⁷Refert id *Ælianus Var. Hist.* IX. 33. *J. B.*

Publ. Syr.
v. 23.

tine Constitutions. We are taught that subjection is due to masters, even to the harsh; and the same is to be referred to kings; for the reason [in St Peter] holds equally good of kings. And we are taught

Lib. xv. 3. frequentaverat, quid ibi didicisset, rogatus respondit, ὁργὴν πατρὸς φέρειν, iram patris ferre. De Lysimacho Justinus :
 Lib. xxvii. 34. apud Livium est : Ut parentum sævitiam, sic patriæ, pati-
 Annał. xii. 11. endo ac ferendo leniendam esse. Apud Tacitum : Ferenda
 Hist. iv. 2. regum ingenia : et alibi : bonos Imperatores voto expetendos, qualescumque tolerandos. Apud Persas, laudante Claudiano [In Eutrop. lib. ii. vers. 479] :

Quamvis crudelibus æquo

Paretur dominis.

Cap. 35. V. 1 Nec ab hac lege Domini discedit ^k consuetudo veterum Christianorum, optima legis interpres. Nam quanquam pessimi sæpe homines imperium Romanum tenuerunt, nec defuerunt, qui obtentu adjuvandæ reipublicæ iis se opponerent, nunquam tamen eorum conatibus se adjunxerunt Christiani. In Clementis constitutionibus est, βασιλείᾳ οὐ θεμιτὸν ἐναντιοσθαι, regiæ potestati resistere nefas. Tertullianus Apologetico : Unde Cassii, et Nigri, et Albini ? unde qui inter duas lauros obsident Cæsarem ? unde qui faucibus ejus exprimendis palæstricam exercent ? unde qui armati palatium irrumpunt, omnibus tot ^l Sigeriis (sic diserte habet manuscriptus, qui est apud omni laude ornatissimos juvenes Puteanos) ac Partheniis audaciores ? De Romanis, ni fallor, id est, de non Christianis. De palæstrica, quod ait, ad Commodi mortem pertinet, peractam imperio præfecti prætorio

^k Consuetudo veterum Christianorum] Ad quam pertinet canon xviii. concilii Calcedonensis, repetitus canone iv. concilii in Trullo : concilium Tolentanum quartum : capitulum ii. Caroli Calvi in villa Colonia. Synodus Suesionensis canone v.

^l Sigeriis] Xiphilinus Domitiano : pag. 237 B. Ed. Steph. ἐπέθετο δὲ

αὐτῷ καὶ συνεσκευάσαντο τὴν πρᾶξιν Παρθένιος ὁ πρόκοιτος αὐτοῦ καὶ Σιγήριος (male Σίγηρος) ἐν τῇ προκοιτίᾳ καὶ αὐτὸς ὦν. Insidias autem ei communicato inter se consilio struxere Parthenius, præpositus cubiculariorum, et Sigerius et ipse e cubiculariis. Martialis libro iv. (Epig. 79) :

Sigeriosque meros, Partheniosque sonas.

also that the subjection required of us includes endurance of evil. So of parents in Publius Syrus, Elian, Justin, Livy : of kings, in Tacitus, Claudian. [See.]

V. 1 The custom of the early Christians, the best interpreters of the law of our Lord, did not deviate from this rule. For though very wicked men held the Roman empire, and there were not wanting persons who opposed them on pretence of relieving the State, the Christians never took part in their attempts. And so the Clementine Consti-

Ælii Læti, manu palæstritæ; quo tamen Imperatore vix quicquam fuit scelerator. Parthenius, cujus factum itidem detestatur Tertullianus, erat ille, qui pessimum Imperatorem Domitianum oppresserat. His comparat Plautianum præfectum prætorio, qui Septimium Severum valde sanguinarium Imperatorem occidere in palatio voluerat. In eundem Septimium Severum arma, quasi pro reipublicæ caritate, sumserant in Syria Pescennius Niger, in Gallia et Britannia Clodius Albinus. Sed horum quoque factum Christianis displicuit, quod et ad Scapulam jactat Tertullianus: *Circa majestatem imperatoris infamamur: tamen nunquam Albiniani, vel Nigriani, vel Cassiani inveniri potuerunt Christiani.* Cassiani illi erant, qui secuti erant Avidium Cassium, virum egregium, qui in Syria sumtis armis causabatur Rempublicam se ire restitutum, quam M. Antonini negligentia perderet.

2 Ambrosius, cum injuriam non sibi tantum, sed et gregi suo, et Christo fieri crederet a Valentiniano, Valentiniani filio; populi satis concitati motu ad resistendum uti non voluit.

^m *Coactus, inquit, repugnare non novi: dolere potero, potero flere, potero gemere: adversus arma, milites, Gothos quoque, lacrymæ meæ arma sunt: talia enim sunt munimenta sacerdotum: aliter nec debeo, nec possum resistere.* Mox: *Exigebatur a me, ut compescerem populum: referēbam, in meo jure esse, ut non excitarem, in Dei manu, ut mitigaret.* Idem Ambrosius Maximi copiis adversus Imperatorem, et

*Epist. v.
Orat. in Aux.
Epist. 32.*

Epist. 33.

Corruptum id nomen non hic modo in Tertulliano fuerat, sed adhuc est in Suetonio, (*Domit. c. 17*), ubi Satrius, et in Victore vulgari, ubi Casperius legitur: (*Epitom. c. 12. num. 8*).

^m *Coactus repugnare non novi*] Inseruit Gratianus causa xxxiii. questione viii. (*Can. 21.*) Idem Ambrosius, epistola xxxiii. *Vultis in vincula ra-*

pere? voluntas est mihi: non ego me vallabo circumfusione populorum. Imitatus est magnus Gregorius libro vii. epistola 1. Si in morte Longobardorum me miscere voluisset, hodie Longobardorum gens nec regem, nec duces, nec comites haberet, atque in summa confusione esset divisa.

tutions enjoin; and Tertullian boasts that the Christians had no share in the murder of the Roman Emperors. [See the passages.]

2 Ambrose, though fearing harm not only to himself but to his flock from Valentinian, would not use the excitement of the people as a means of resistance; as he says in his Epistles. [See.] The same Ambrose would not use the forces of Maximus against the Emperor, though both an Arian and an oppressor of the Church. So when Julian the Apostate was pursuing the most destructive counsels, he was

Theodoret.
Hist. Eccles.
v. 4.

Orat. 1. in
Julianum,
p. 94 A.

Ibid. p. 80.

Tom. iv. p.
886. Prop. 7A.

Arianum et Ecclesiæ gravem, uti noluit. Sic Julianum defec-
torem cum pessima consilia agitaret, lacrymis Christianorum
repressum, ait Nazianzenus, addens, *τοῦτο μόνον ἐχόντων*
κατὰ διώκτον φάρμακον, quia solum hoc contra persecutio-
rem erat remedium. Atqui exercitus ejus ferme omnis ex
Christianis constabat. Adde quod, ut observat idem Nazian-
zenus, sævitia illa Juliani non tantum in Christianos erat in-
juria, sed et rempublicam in summum adduxerat periculum.
Accedat his illud Augustini, ubi illa Apostoli ad Romanos
dicta explicat: *Necesse est propter hanc vitam nos subditos*
esse oportere, non resistentes si quid illi (rectores) auferre
voluerint.

VI. 1 Inveni sunt nostro sæculo viri eruditi quidem illi,
sed temporibus et locis nimium servientes, qui sibi primum
(ita enim credo) deinde aliis persuaderent, ea quæ jam dicta
sunt, locum habere in privatis, "non etiam in magistratibus
inferioribus, quibus jus esse putant resistendi injuriis ejus,
cujus summum est imperium; imo et peccare eos, ni id faciant:
quæ opinio admittenda non est. Nam sicut in dialecticis
species intermedia, si genus respicias, est species; si speciem
infra positam, genus: ita magistratus illi, inferiorum quidem
ratione habita, sunt publicæ personæ; at superiores si consi-
derentur, privati sunt. Nam omnis facultas gubernandi, quæ
est in magistratibus, summæ potestati ita subjicitur, ut quic-
quid contra voluntatem summi imperantis faciant, id defectum
sit ea facultate, ac proinde pro actu privato habendum. Lo-
cum enim hic quoque habet, quod dicunt Philosophi, ordinem
non dari, nisi cum relatione ad aliquid primum.

Aver. v. Me-
taph. com. 6.

" Non etiam in magistratibus infe-
rioribus] Petrus Martyr ad Judicium
III. Parsus ad XIII. caput ad Roma-
nos, Junius Brutus, Danæus libro VI.

politicorum, et alii.

° Species intermedia] Genus spe-
ciale Senecæ epistola LVIII.

¶ Ordo et ἐπαλληλισμός] Sic in

repressed only by the tears [not the arms] of the Christians. And yet
his army consisted almost entirely of Christians. Add to this that
Julian's cruelty was not only a wrong to the Christians, but brought
the State into great danger. So Augustine.

VI. 1 Some learned men of our time, yielding too much to the
influences of time and place, have persuaded first themselves (for so I
believe) and then others, that this, though true of private persons, is
not true of inferior magistrates; that they have a right of resistance,
and ought to use it; which opinion is not to be admitted. For those

2 Ac mihi videntur, qui contra sentiunt, talem statum rerum inducere, qualem antiqui fabulabantur in cœlo fuisse, antequam majestas oriretur, quo tempore aiunt minores Deos Jovi non concessisse. At is quem dixi ^Pordo, et ὑπαλληλίσμους, non tantum sensu communi cognoscitur: unde illud [Senec. *Thyest.* vers. 612]:

Omne sub regno graviore regnum est.

Et Papinii illud [III. *Sylv.* 3. vers. 49, 50]:

Vice cuncta reguntur:

Alternisque regunt.

Et ¹ Augustini dictum celebre: *Ipsos humanarum rerum gra-* c. qui Resist.
duS adverte: si aliquid jussit curator, faciendum: non 97. Caus. xi.
tamen, si contra proconsul jubeat: aut si consul aliquid qu. 3.
jubeat, et aliud Imperator: non utique contemnis potesta-
tem, sed eligis majori servire: nec hinc debet minor irasci,
si major prælatus est. Et hoc ejusdem de Pilato: Talem Ad Joh. Tom.
quippe Deus dederat illi potestatem, ut esset etiam ipse sub ix. p. 368.
Cæsaris potestate.

3 Sed et divina probatur auctoritate. Nam Apostolorum 1 Ep. Petr.
princeps subjectos nos esse vult aliter regi, aliter magistrati- ii. 13.
bus: regi, ut supereminenti, id est, sine ulla exceptione,
præter ea quæ Deus directe imperat, qui injuriæ patientiam
probat, non interdicat: magistratibus, tanquam missis a rege,
id est potestatem suam a rege ducentibus. Et cum Paulus
omnem animam supremis potestatibus esse subjectam vult, Rom. xiii. 1.
etiam magistratus inferiores inclusit. Neque in populo He-
bræo, ubi tot fuere reges divini humanique juris contemtores,

familia paterfamilias primus, inde ma- ^{1 Augustini]} Habet prope eadem
terfamilias, inde filii, mox ordinarii Augustinus sermone vi. in Verba Do-
servi, postremo servi vicarii. Vide mini.
Chrysostomum 1. ad Corinth. xiii. 3.

inferior magistrates, though public persons with regard to their inferiors, are private persons with regard to their superiors. All authority is subject to the Sovereign authority; and what is not done by that authority is a private act. [See the Scholastic reasons.]

2 The state of things thus defended is like that fabled in heaven, when the minor Deities rebelled against Jove. The subordination of all to the Supreme Power is recognized by common sense; in Seneca; Papinius; Augustine. [See.]

3 And also by Divine Authority; expressed by Peter, Paul, Samuel.

unquam inferiores magistratus, in quibus plurimi fuere viri pii et fortes, id sibi juris sumserunt, ut regibus vim ullam opponerent, nisi si qui a Deo, cujus in reges summum jus est, mandatum speciale acceperant: quin contra, quod procerum officium sit, ostendit Samuel, cum, proceribus et populo inspectante, Saulem jam perverse regnantem solita veneratione est prosequutus.

4 Atque adeo religionis quoque publicæ status nunquam non a regis ac Synedrii arbitrio pependit. Quod enim post regem magistratus simul cum populo Deo se fideles fore promiserunt, id intelligi debet, quatenus in cujusque id futurum erat potestate. Ne simulacra quidem falsorum Deorum, quæ publice exstabant, dejecta unquam legimus, nisi jussu aut populi in libera republica, aut regum cum regnabantur. Quod si quid aliquando factum est vi contra reges, narratur in testimonium divinæ providentiæ id permittentis, non in facti humani approbationem.

5 Solet a contrariæ sententiæ auctoribus proferri dictum Trajani, cum pugionem præfecto prætorio traderet: *⁹ Hoc pro me utere, si recte impero; si male, contra me.* Sed sciendum est, Trajanum, ut ex Plinii *Panegyrico* apparet, id unice curasse, ne quid regium ostentaret, sed ^rverum princi-

^⁹ Refertur a Xiphilino, pag. 248 D. *Ed. Steph.* Vide et Plinii Junioris *Panegyric.* c. 67. et Cassiodor. *Var.* VIII. 13. *J. B.*

^r *Verum principem gerere*] Quod postea imitati Pertinax et Macrinus: quorum orationes egregias apud Hero-

dianum vide. (Lib. II. cap. 3; Lib. IV. cap. 14. *Edit. Bæcler.*)

^⁹ Vide JOSEPH. *Antiq. Jud.* Lib. XIV. cap. IV. § 2. *Ed. Hudson.* et Clariss. CLERICUM, in *Marc.* III. 4. *J. B.*

^⁹ *Σαφῶς ὑπὲρ ψυχῆς θίμεν*] Maccaeorum, Lib. I. c. 9. 10. 43. et 44. καί

4 And so also the state of public religion depends on the will of the King and the Council. (Synedrium.) The engagement of the magistrates and the people to be faithful to God, after the king, is to be understood, as far as is in their power. We do not read of the images of false gods being thrown down, except by command either of kings, or of the people when free. When this is done by force against the consent of the kings, it is related as a testimony of Divine Providence so permitting; not in approval of the human act.

5 On the contrary is urged Trajan's saying when he gave the dagger to the Prætorian Prefect: *Use it for me if I rule rightly; if ill, against me.* But Trajan wished to avoid assuming kingly authority, and to be a true Governor (Princeps), and as such was subject to the will of the Senate and people; whose commands the Prefect was to

pem gereret, qui proinde subesset sanatus populique iudicio; quorum sententias exsequi præfectus deberet etiam in ipsum principem. Simile est, quod de M. Antonino legimus, qui publicam pecuniam attingere noluit, nisi consulto senatu.

Xiphilin. in
c. VII. p.
261.

VII. 1 Gravior illa est quæstio, an lex de non resistendo nos obliget in gravissimo et certissimo discrimine. Nam leges etiam Dei quædam, quamquam generaliter prolatae, tacitam habent exceptionem summæ necessitatis: quod de lege sabbati Ὁ ἡσάμωνσorum temporibus a sapientibus definitum fuit: unde dictum celebre: *periculum animæ impellit sabbatum*: et Judæus apud Synesium causam neglectæ legis de sabbato hanc reddit: *ἡσάφῳς ὑπὲρ ψυχῆς θέομεν, in certissimum vitæ periculum adducti sumus*. Quæ exceptio probata est ipsi Christo: ut et in lege altera de non edendis panibus propositionis. Et Hebræorum magistri legibus de cibis vetitis, aliisque nonnullis, ex veteri traditione eandem addunt exceptionem, recte quidem: non quod Deo jus non sit ad certam mortem subeundam nos obstringere, sed quod leges quædam ejus sint argumenti, ut non credibile sit datas ex tam rigida voluntate: quod in legibus humanis magis etiam procedit.

2 Non nego a lege etiam humana quosdam virtutis actus posse præcipi, sub certo mortis periculo, ut de statione non

ἤκουσε Βακχίδης καὶ ἦλθε τῇ ἡμέρᾳ τῶν σαββάτων ἕως τῶν κρηπιδῶν τοῦ Ἰορδάνου ἐν δυνάμει πολλῇ, καὶ εἶπεν Ἰωναθάν τοῖς παρ' αὐτοῦ ἀναστῶμεν νῦν πολεμήσωμεν ὑπὲρ τῶν ψυχῶν ἡμῶν οὐ γὰρ ἔστι σήμερον ὥς ἐχθρὸς καὶ τρίτην ἡμέραν. Id cum audisset

Bacchides, venit multo cum exercitu ad Jordanis ripas ipso die sabbati. Jonathan autem suis dixit: Surgamus nunc, et pro vita pugnemus; neque enim nostre res se habent ut heri et nudius tertius.

De statione non deserenda] Vide Josephum ubi de custodibus Sanlis agit.

execute, even against the Prince. So M. Antoninus would not touch the public money without consent of the Senate.

VII. 1 Whether in a very grave and certain danger the rule of non-resistance holds, is a more difficult question. For the laws of God may admit of exemption in cases of extreme necessity. So the Hebrew law of the Sabbath did; and this exception is approved by Christ; as also in the case of the shew-bread. And so other laws of the Hebrews did. Not that God has not the Right of our obedience under certain death; but that some laws are of such a nature that it is not credible that they were given with so rigid an intention: still more in human laws.

2 Yet even human laws may command some acts of virtue with certain danger of death; as the military rule of not quitting our post.

deserenda; sed nec temere ea voluntas legem condentis fuisse intelligitur, neque videntur homines in se et alios tantum jus accepisse, nisi quatenus summa necessitas id exigat. Ferri enim leges ab hominibus solent et debent cum sensu humanæ imbecillitatis. Hæc autem lex, de qua agimus, pendere videtur a voluntate eorum, qui se primum in societatem civilem consociant, a quibus jus porro ad imperantes manat. Hi vero si interrogarentur, an velint omnibus hoc onus imponere, ut mori præoptent quam ullo casu vim superiorum armis arcere, nescio an velle se sint responsuri, nisi forte cum hoc additamento, si resisti nequeat, nisi cum maxima reipublicæ perturbatione, aut exitio plurimorum innocentium. Quod enim tali circumstantia caritas commendaret, id in legem quoque humanam deduci posse non dubito.

3 Dicat aliquis, rigidam illam obligationem, mortem potius ferendi, quam ullam unquam superiorum injuriam repellendi, non ex lege humana, sed divina proficisci. Sed notandum est, primo homines non Dei præcepto, sed sponte adductos experimento infirmitatis familiarum segregum adversus violentiam, in societatem civilem coisse, unde ortum habet potestas civilis, quam ideo humanam ordinationem Petrus vocat: quanquam alibi et divina ordinatio vocatur, quia homi-

1 Pet. ii. 13.

(*Ant. Jud. Lib. vi. cap. 13, § 9. Ed. θάνατος ἢν πρόστιμον τῆς ἐφεδρείας Hudson.*) Polybius: *κατὰ Ῥωμαίους λιπόντι τὴν τάξιν.* [Habet e Suida,

But this is not lightly to be supposed the intention of the lawgiver; nor do men appear to have accepted it so, unless extreme necessity require. For laws are and ought to be made, with a sense of human weakness. The law of which we speak (that of non-resistance) seems to depend on those who first formed civil society, and from whom the Rights of Rulers are derived. And if these could be asked whether they would impose on all this burthen, that they should prefer to die rather than in any case resist a superior by force, it is probable they would answer that they would not: unless perhaps with this addition; except resistance would involve extreme disturbance of the State, and the death of many innocent persons. And what benevolence would recommend in such circumstances, we may confidently ascribe to human law.

3 It may be said that the rigid obligation of bearing death rather than resisting a superior, proceeds not from human, but from Divine Law. But it is to be noted that Civil Society is the result, not of Divine precept, but of the experience of the weakness of separate families to protect themselves; and is thus called by Peter an ordi-

num salubre institutum Deus probavit. Deus autem humanam legem probans censetur probare ut humanam et humano modo.

4 Barclaius regii imperii assertor fortissimus huc tamen descendit, ut populo et insigni ejus parti jus concedat se tuendi adversus immanem sævitiam; cum tamen ipse fateatur totum populum regi subditum esse. Ego facile intelligo, quo pluris est id quod conservatur, eo majorem esse æquitatem, quæ adversus legis verba exceptionem porrigat: attamen indiscriminatim damnare aut singulos aut partem populi minorem, quæ ultimo necessitatis præsidio sic utatur, ut interim et communis boni respectum non deserat, vix ausim. Nam David, qui extra pauca facta testimonium habet vitæ secundum leges exactæ, armatos circum se primum quadringentos, deinde plures aliquanto habuit; quo nisi ad vim arcendam si inferretur? Sed simul illud notandum est, non factum id a Davide, nisi postquam et Jonathanis indicio, et pluribus aliis certissimis argumentis compererat Saulem vitæ suæ imminere. Deinde vero nec urbes invadit, nec pugnandi captat occasiones, sed latebras quærit, modo in locis deviis, modo apud populos externos, et hac religione ut popularibus suis nunquam noceat.

Lib. III. adv.
Monarch. c. 8.
Lib. VI. c. 23,
24.

1 Sam. xxi.
2 et xxiii. 13.

voce *πρόστυμα*: nam verba paullo aliter legantur apud ipsum Historicum, Lib. I. cap. 17. J. B.]

nance of man, though it is also an ordinance of God, because he approves it. And God, approving a human law, must be conceived approving it as human, and in a human manner.

4 Barclay, the most strenuous assertor of royal authority; yet allows that the people, or a *considerable part* of it, has the Right of protecting itself against extreme cruelty, though he asserts the whole people to be subject to the king. I can understand, that in proportion as what is preserved [by the rule of non-resistance] is more valuable, so much the more serious a matter is the equitable construction, which allows an exception to the words of the law. But still, I do not venture indiscriminately to condemn, either *individuals* or a *minority* of the people who thus have recourse to the ultimate means of necessity, provided they do not desert a respect for the common good. So David gathered the discontented to him, and had above four hundred armed men, of course, to repel violence. But this was not till David knew that Saul sought his life. And he did not seize upon cities, but hid himself in desert places or in foreign countries, avoiding to do harm to those of his nation.

5 Simile videri potest factum Maccabæorum: nam quod quidam hæc arma eo titulo defendunt, quasi Antiochus non rex, sed invasor fuerit, vanum puto: cum nusquam in omni historia Maccabæi, et qui eorum partes sequebantur, Antiochum alio quam regis nomine compellent; et merito sane, cum jampridem Macedonum imperia agnovissent Hebræi, in quorum jus Antiochus successerat. Nam quod lex vetat alienigenam populo præfici, de voluntaria electione intelligendum est, non de eo, quod temporum necessitate adductus populus facere cogebatur. Quod vero aiunt alii, usos Maccabæos jure populi, cui αὐτονομία deberetur, ne id quidem firmum. Nam Judæi primum a Nabuchodonosore devicti jure belli ex eodem jure successoribus Chaldæorum Medis et Persis paruerant: quorum "totum imperium ad Macedonas devenit. Hinc Judæi Tacito vocantur, *Dum Assyrios penes Medosque et Persas oriens fuit, vilissima pars servientium*. Nec quicquam ab Alexandro ejusque successoribus stipulati sunt, sed sine ulla conditione in eorum ditionem venerunt, sicut ante sub ditione Darii fuerant. Quod si et Judæi interdum ritus suos et leges palam exercere permissi sunt, id fuit ex regum beneficio jus precarium, non ex lege aliqua imperio addita. Nihil ergo est quod Maccabæos tueatur præter summum cer-

Hist. v. 2.

" Totum imperium ad Macedonas devenit] Justinus, libro xxxvi. Primus Xerxes rex Persarum Judæos domuit postea cum ipsis Persis in ditionem Alexandri magni venire, diuque in potestate Macedonici imperii subjecti Syria regno fuere. A Demetrio cum descivissent, amicitia Romanorum petita, primi omnium ex orientalibus libertatem receperunt, facile tunc Romanis de alieno largientibus. (Cap. 3.)

¹ Non ita falluntur. Dicemus in Notis Gallicis ad hunc locum. J. B.

² Principi in populo tuo non maledices] Joabus Semeis apud Josephum: οὐ τεθνήξῃ βλασφημήσας τὸν ὑπὸ τοῦ Θεοῦ κατασταθέντα βασιλεύειν; An non morereris, qui ei maledicere ausus

es, quem Deus in regni sede constituit? [Ant. Jud. Lib. vii. cap. 11, § 2. Verum ibi qui loquitur, non est Joabus, sed frater ejus Abisais, Tserujæ filius. J. B.]

³ Obstabat plena divinatorum memoria mandatorum] Josephus de Davide: μετανοήσας δ' εὐθὺς, οὐ δίκαιον εἶπε φονεῦν τὸν ἑαυτοῦ δεσπότην. Sed statim pœnitundine ductus, injustum facinus esse dixit, dominum suum occidere. (Lib. vi. c. 13, § 4). Et post: Τὸν ὑπὸ τοῦ Θεοῦ κεχειροτονημένον βασιλεὺς δεινὸν ἀποκτείνειν κἂν ᾗ πονηρός· ἤξειν γὰρ αὐτῷ παρὰ τοῦ δίδόντος τὴν δίκην. Horrendum, regem quamvis malum interficere: pœnam enim id facienti imminere ab eo qui regem dedit.

5 So the Maccabees were not justified by the general right of resistance; for Antiochus was king, and they had no legal right of resistance. They were justified by extreme danger.

6 And even in such a case, the person of the king is to be re-

tissimumque periculum: quamdiu scilicet intra sui defendendi terminos ita se continuerunt, ut in loca devia exemplo Davidis secederent, querendæ securitati; nec arma expedirent, nisi ultro oppugnati.

6 Illa interim cautio tenenda est, etiam in tali periculo personæ regis parcendum: quod qui factum a Davide putant non ex officii necessitate, sed ex sublimiore proposito, ¹falluntur. Ipse enim David aperte dixit, insontem neminem ^{1 Sam. xxvi. 9.} esse posse, qui manus regi inferret. Nimirum sciebat scriptum in lege: *Diis*, id est, iudicibus summis, *non maledices, et* ^{Exod. xxii. 28.} *principi in populo tuo non maledices*; in qua lege mentio facta specialis eminentium potestatum, ostendit aliquid præcipi speciale. Quare Optatus Milevitanus de hoc Davidis facto ^{Lib. II.} loquens, ²*Obstabat*, ait, *plena divinorum memoria mandatorum*. Et verba Davidi hæc tribuit: *Volebam hostem vincere, sed prius est divina præcepta servare*.

7 At falsa maledicta ne in privatum quidem licet jacere; in regem ergo veris quoque abstinendum; quia, ut ait scriptor problematum, quæ Aristotelis nomen præferunt: *ὁ κακηγο- § 29. n. 14.*
ρῶν τὸν ἄρχοντα, εἰς τὴν πόλιν ὑβρίζει. *Qui rectori maledicit, in civitatem est injurius*. Quod si voce lædendus non est, manu certe multo minus: unde et pœnitentia tactum

[Ibid. § 9. Edit. Huds. In loco priore non omittere debuit Auctor hæc verba, εὐδὲ τὸν ὑπὸ τοῦ Θεοῦ βασιλείας ἀξιωθέντα, cuiusque qui a Deo Rex constitutus est. In loco altero versio ejus etiam male omittit hæc, ὑπὸ τοῦ Θεοῦ κεχειροτονημένον, quæ idem significant, obstantque adeo, quominus de omnibus in universum Regibus locus intelligi queat. Quamvis et Doctissimus SALMASIUS, *Resp. ad Milton.* pag. 163. in Versione illius loci omittat illa verba, quæ tamen in Græco ponit; quasi scilicet voce sola Regis continerentur. Sed pejus est, quod in fine, omisis quibusdam, sensus plane corruptus ab Auctore nostro, præ nimio forte studio causæ suæ serviendi. Ita habent Græca:

"Ἦξειν γὰρ αὐτῷ παρὰ τοῦ δόντος τὴν ἀρχὴν σὺν χρόνῳ τὴν δικήν, *Venturam enim aliquando ipsi (Regi scilicet) pœnam, ab eo qui dedit illi imperium. J. B.*

² *In civitatem est injurius*] Julianus *Misopogone*: καὶ γὰρ οἱ νόμοι φοβεροὶ διὰ τοὺς ἄρχοντας, ὥστε ὅστις ἄρχοντα ὑβρίζει, ἐκ περιουσίας τοὺς νόμους κατεπάτησεν. *Sunt enim leges severæ pro principibus, ita ut qui in principem injuriosus fuerit, is ex animi libidine conculcaverit leges.* (Pag. 342 v. Edit. Spanh.) [Non satis adæquate vertitur hic locus. Id vult Imperator: *Metuentur Leges propter Imperantes* (a quibus scilicet auctoritatem et vim omnem habent). *Qui igitur in ipsum Imperantem injurius est, multo audacius*

spected; as was done by David.

7 Nor are those who resist to throw false reproaches on any one; but on the king, not even true ones. Still more are they to abstain from laying hands on him. [See the heathen authorities.]

1 Sam. xxiv. 6. Davidem legimus, quod vestem ejus violasset: tantam intelligebat personæ istius esse sanctitudinem! nec immerito: nam cum summum imperium non possit non multorum odiis patere, securitas fungentis peculiariter fuit munienda. Quod Romani etiam in Tribunis plebis constituerunt, ut ἄσυλοι, id est, inviolabiles essent. Inter Essenorum dicta erat, reges sanctos esse habendos: et insigne illud apud Homerum:

Περὶ γὰρ διὲ ποιμένι λαῶν,
μή τι πάθοι.

^bNam pro populi pastore timebat,
Nequid ei accideret.

Lib. x. 3. Nec immerito, ut apud Curtium est, *regium nomen gentes, quæ sub regibus sunt, pro Deo colunt*: Artabanus Persa; ἡμῖν δὲ πολλῶν νόμων καὶ καλῶν ὄντων κάλλιστος οὗτός ἐστι, τὸ τιμᾶν βασιλέα καὶ προσκυνεῖν, εἰκόνα Θεοῦ τὰ πάντα σώζοντος. Nobis inter leges multas easque bonas hæc optima est, regem colendum et adorandum, ut Dei cuncta sospitantis effigiem. Plutarchus Agide: οὐ θεμπτόν οὐδὲ νενομισμένον βασιλέως σώματι τὰς χεῖρας προσφέρειν, nec fas nec licitum regis corpori manus inferre.

8 Illa quæstio gravior, an quantum Davidi, an quantum Maccabæis licuit, liceat et Christianis, quorum magister crucem subire toties jubens exactiorem patientiam videtur requirere. Certe ubi superiores ob religionem mortem intendant Christianis, Christus fugam concedit, his scilicet, quos

Leges conculcabit. Sic, ut cuivis patet, locus ad rem nihil facit. J. B.]

^a Non possit non multorum odiis patere] Quintilianus *Declamationes* cccxlviii. Hanc esse conditionem omnium, qui administrationem reipublicæ aggrediuntur, ut ea, quæ maxime pertinent ad salutem communem, cum quadam sui invidia efficere cogantur. Vide ea de re Livii verba ad Augustum apud Xiphilinum ex Dione. (Pag. 85, 86. Ed. H. Steph.)

^b Nam pro populi pastore timebat] Bene Chrysostomus, 1 ad Tim. i. Si quis ovem jugulet, ab eo gregem imminui: at si quis pastorem de medio sustulerit, ab eo totum gregem dissipari. Seneca libro *Priore de Clementia*, cap. iii. Somnum ejus nocturnis excubiis maniant: latera objecti circumfusique defendunt: incurrentibus periculis se opponunt. Non hic est sine ratione populis urbibusque consensus sic protegendis amandisque reges, et se suaque jactandi, quocumque desi-

8 Whether what was lawful for David and for the Maccabees be lawful for Christians, is a graver question, since their Master, commanding them to bear their cross, seems to require a more exact patience. And certainly Christ counsels flight to Christians who are in danger of death, (that is, those who are not bound to their place

officii necessitudo nulli loco alligat: ²ultra fugam nihil. Petrus vero Christum ait cum pateretur, nobis reliquisse exemplum quod sequamur, qui cum peccato vacaret, et doli omnis immunis esset, convitia convitiis non reposuit, neque inter patiendum minatus est, sed rem permisit juste judicanti. Idem gratias agendas Deo ait, et gaudendum Christianis, si tanquam Christiani pœnis subdantur. Et hac maxime patientia invaluisse Christianam religionem legimus.

9 Quare Christianis veteribus, qui recentes ab apostolorum et apostolicorum virorum disciplina eorum præscripta et intelligebant melius, et perfectius implebant, summam injuriam fieri puto ab iis, qui quo minus ipsi se defenderent in certissimo mortis periculo, vires putant illis, non animum defuisse. Imprudens certe et impudens fuisset Tertullianus, si apud Imperatores, qui ejus rei ignari esse non poterant, ita confidenter ausus esset mentiri: *Si enim hostes et apertos, non tantum vindices occultos agere vellemus, deesset nobis vis numerorum et copiarum? Plures nimirum Mauri et Marcomanni, ipsique Parthi, vel quantæcunque unius tamen loci et suorum finium gentes, quam totius orbis? Externi sumus, et vestra omnia implevimus, urbes, insulas, castella, municipia, conciliabula, castra ipsa, tribus, decurias, palatium, senatum, forum: sola vobis reliquimus templa. Cui bello non idonei, non prompti fuissemus, etiam copiis impares, qui tam libenter trucidamur, si non apud istam*

1 Pet. ii. 21;
iv. 12-16.

Apolog. 37.

deraverit imperantis salus. Nec hæc vililitas cui est aut dementia, pro uno capite tot millia excipere ferrum, ac multis mortibus unam animam redimere, nunquam senis et invalidi. Quemadmodum totum corpus animo deservit (quod ipsum late ibi exsequitur) sic hæc immensa multitudo unius animæ circumdata illius spiritu regitur, illius ratione flectitur, pressura se hac fractura viribus suis, nisi consilio sustineretur. Suam itaque incolumitatem amant, etc. Adde

quæ infra, Lib. ii. cap. 1, § ix.

^c Artabanus Persæ] Apud Plutarchum Themistocle. (Pag. 125 c.)

² Dictum Christi unice pertinet ad Apostolos, ut patet ex sequentibus. Auctor ipse se refellit, quando in Adnotationibus ad hunc locum Matth. x. 23, verba illa solis Apostolis adcommodat, et inde fatetur non posse argumentum duci, ad definendam questionem, An sponte fugere liceat, periculi tantum vitandi causa? J. B.

by duty,) but nothing beyond flight. So Peter says that Christ *has left us an example*, 1 Pet. ii. 21, and that we are to rejoice if we suffer as Christians, 1 Pet. iv. 12, 13, 14. And by such patience the Christian religion grew strong.

9 And so the ancient Christians teach: Tertullian; Cyprian; Lactantius; Augustine. [See the passages.]

disciplinam magis occidi liceret quam occidere? Sequitur hic quoque magistrum suum Cyprianus, et aperte prædicat: *Inde est, quod nemo nostrum, quando apprehenditur, reluctantatur: nec se adversus injustam violentiam vestram, quamvis nimius et copiosus noster sit populus, ulciscitur. Patientes facit de secutura ultione securitas.* ^d *Innocentes nocentibus cedunt.* Et Lactantius: *Confidimus enim majestati ejus, qui tam contentum sui possit ulcisci quam servorum suorum labores et injurias. Et ideo cum tam nefanda perpetimur, ne verbo quidem reluctantur: sed Deo remittimus ultionem.* Nec aliud spectavit Augustinus, cum dicit: *Nihil justus præcipue cogitet in his rebus, nisi ut bellum suscipiat, cui bellare fas est: non enim fas est omnibus.* Ejusdem est illud: *Quoties Imperatores in errore sunt, leges ad tuendum errorem contra veritatem condunt, per quas justî examinantur et coronantur.* Idem alibi: *Ita a plebibus principes et a servis domini ferendi sunt, ut sub exercitatione tolerantiae sustineantur temporalia, et sperentur æterna.* Quod veterum Christianorum exemplo alibi sic explicat: *Neque tunc civitas Christi, quamvis adhuc peregrinaretur in terris, et haberet tam magnorum agmina populorum adversus impios persecutores, pro temporali salute pugnavit, sed potius, ut obtineret æternam, non repugnavit. Ligabantur, includebantur, cædebantur, torquebantur, urebantur, laniabantur, trucidabantur, et multiplicabantur. Non erat eis pro salute pugnare, nisi salutem pro salute contemnere.*

10 Nec minus egregia sunt, quæ in eandem sententiam habet Cyrillus in locum Johannis de gladio Petri. Thebæa

^d *Innocentes nocentibus cedunt*] Hæc sunt in scripto ad Demetrianum. Ejusdem hæc libri primi epistola 1. *Intellexit (adversarius) Christi milites vigilare, jam sobrios et armatos ad prælium stare, vinci non posse, mori posse; et hoc ipso invictos esse, quia nec mori timeant, nec repugnare contra impugnantes, cum occidere innocentibus nec nocentem liceat, sed prompte et animas, et sanguinem*

tradere. (Ep. 60. Ed. Fell.)

^e At vero mera est fabula, quæcumque de illa Thebæa Legione dicuntur. Historia ipsa per se habet plurima indicia falsi: et libellus, in quo narratur, hoc titulo, *Passio Agaunensium Martyrum*, non est EUCHEBII, Lugdunensis Episcopi, cui tribuitur, ut vel ex eo patet, quod Sigismundi, Burgundiae Regis, Auctor meminere, qui Rex tamen sat

10 So Cyril holds concerning the sword of Peter. So the Theban legion did not resist when decimated for refusing to sacrifice.

legio, ³ut acta nos docent, militibus constabat sexies mille sexcentis sexaginta sex Christianis omnibus: Qui, cum Maximianus Cæsar apud Octodurum exercitum compelleret sacra Diis falsis facere, primum Agaunum iter arripuerunt: et cum eo misisset Imperator, qui eos ad sacrificandum venire juberet, ipsique se id facturos negassent, Maximianus decimum quemque jussit interfici per apparitores, qui nemine repugnante facile imperium sunt exsecuti.

11 ⁴Mauritius ejus legionis primicerius, a quo Agaunum vicus Mauriti dictus est postea, narrante Eucherio Episcopo Lugdunensi, eo tempore commilitones sic allocutus legitur: *Quam timui, ne quisquam, quod armatis facile est, speciei defensionis, beatissimis funeribus manus obviam afferre tentaret! jam mihi ad hujus rei interdictum Christi nostri parabatur exemplum, qui exentum vagina apostoli gladium propriæ vocis jussione recondidit: docens, majorem armis omnibus Christianæ confidentiæ esse virtutem, ne quisquam mortali operi mortalibus dexteris obsesteret, quin imo cæpti operis fidem perenni religione compleret.* Cum hoc supplicio peracto Imperator superstitionibus eadem quæ ante præciperet, sic omnes respondent: *Milites quidem, Cæsar, tui sumus et ad defensionem reipublicæ Romanæ arma suscepimus: nec unquam aut desertores bellorum aut proditores militiæ fuimus, aut ignavos formidinis meruimus subire flagitium. Tuis etiam obtemperaremus præceptis, nisi instituti legibus Christianis, dæmonum cultus et aras semper pollutas sanguine vitaremus. Comperimus præcepisse te, ut aut sacrilegiis pollueres Christianos, aut de denis interceptis nos velles terrere. Non inquiras longius latitantes:*

diu post mortem Eucherii regnavit. Hæc demonstravit Clar. JOANNES DUBOURDIEU, Dissertatione singulari, Anglicæ primum edita ann. 1696. postea Gallicæ, ut erat nata, Amstel. 1706. J. B.

⁴ *Mauritius*] De hujus martyris honoribus apud Helvetios vide Guillimanum. (Lib. I. c. 15 et II. 8.) In veteri scripto de translatione sancti Justini in novam Corbeiam: *Unde justa*

idem Chronicorum sub atrocissima et incomparabili illa decima post Neronem persecutione passum eum colligimus: quæ et prioribus persecutionibus immenior, dum venerabilem multitudinem martyrum calis mitteret, inter quos etiam præcipuum sancti Mauriti collegium, et innocentia speculum. De Thebeis martyribus Brunsvicum translatis vide Crantzium Saxoniorum VII. 16.

11 [The speeches of Mauritius the captain of the Theban legion, and of the soldiers, are to the same effect.]

Nos omnes Christianos esse cognosce: habebis potestati tuæ subdita omnium corpora: auctorem vero suum respicientes Christum animas non tenebis.

12 Tum Exuperius legionis signifer sic eam allocutus ibidem narratur: *Tenere me, commilitones optimi, sæcularium quidem bellorum signa perspicitis; sed non ad hæc arma provoco, non ad hæc bella animos vestros virtutemque compello. Aliud vobis genus eligendum est præliorum. Non per hos gladios potestis ad regna cælestia properare. Deinde Imperatori hæc nuntiari jubet: Non nos adversum te, Imperator, armavit ipso, quæ fortissima est in periculis, desperatio. 'Tenemus ecce arma et non resistimus, quia mori magis quam vincere volumus, et innocentes interire, quam novii vivere præoptamus. Et postea: Tela projicimus: exarmatas quidem dexteræ satellites tuus, sed armatum fide catholica pectus inveniet.*

13 Sequitur post hæc laniena in non repugnantes, in cujus narratione hæc sunt Eucherii verba: *Ne justî punirentur, multitudo non obtinuit, cum inultum (male editur multorum) esse soleat, quod multitudo delinquet.* In veteri martyrologio res eadem sic narratur: *Cædebantur itaque passim gladiis non reclamantes, sed et depositis armis cervices persecutoribus, vel intectum corpus offerentes, non vel ipsa suorum multitudine, non armorum motione elati sunt, ut ferro conarentur asserere justitiæ causam, sed hoc solum*

'Tenemus ecce arma et non resistimus']

Similia sunt illa Judæorum Alexandrinorum ad Flaccum [Immo ad Petronium, *De Legat. ad Caium*, p. 1025.] *δοκλοῖ ἔσμεν, ὡς ὁρᾷς· παραγενομένοι δὲ αἰτιῶνται τινες ὡς πολεμίου.* & δὲ ἡ φύσις ἐκάστῳ προσέειπεν ἀμνηστία μὲν χεῖρας, ἀπεστρέφμεν, ἵνα μὴδὲν ἐργάσασθαι δύνανται, παρῆγοντες αὐτῶν τὰ σώματα πρὸς εὐ-

σκόπου τοῖς θέλουσιν ἀποκτείνειν βουλᾷς, et quæ sequuntur. Inermes sumus, ut vides, et tamen sunt qui nos tanquam hostes publicos hic criminantur. Etiam eas, quas ad nostri tutelam partes dedit natura, retro vertimus, ubi nihil habent quod agant: corpora præbemus nuda ac patientia ad impetum eorum, qui nos volent occidere.

s Valens'] Vide excerpta ex Johanne

12 [As also the speech of Exuperius their standard-bearer.]

13 Then the butchery followed. The old martyrology tells the story of their suffering without resisting.*

14 Those who professed the *ὁμοούσιον* (the Son of one substance with the Father) were put to death without resistance by Valens.

15 He who follows such examples, if he so lose his life, saves it, as Christ has declared.

* But Barbeyrac says the story is 'mera fabula.'

reminiscentes, se illum confiteri, qui nec reclamando ad occisionem ductus est, et tanquam agnus non aperuit os suum; ipsi quoque tanquam grex Dominicanorum ovium laniari se tanquam ab irruentibus lupis passi sunt.

14 Valens impie et crudeliter sæviit in eos, qui secundum sacras literas et Patrum traditionem τὸ ὁμοούσιον profitebantur, quorum quamvis maxima multitudo nunquam se armis tutata est.

15 Certe ubi patientia nobis præscribitur, sæpe adduci videmus, et a Thebæis militibus adductum jam audivimus Christi exemplum, ut nobis imitandum, cujus patientia ad mortem se extendit. Ac qui ita animam perdit, is vere eam acquisivisse a Christo pronuntiatur. Diximus summum imperium tenentibus resisti jure non posse. Nunc quædam sunt, quæ lectorem monere debemus, ne putet in hanc legem delinquere eos, qui revera non delinquant.

VIII. Primum ergo, qui principes sub populo sunt, sive ab initio talem acceperunt potestatem, sive postea ita convenit, ^but Lacedæmone, si peccent in leges ac rempublicam, non tantum vi repelli possunt, sed, si opus sit, puniri morte: quod Pausaniæ regi Lacedæmoniorum contigit. Atque hujus generis cum fuerint vetustissima per Italiam regna, mirum non est, si post narrata crudelissima Mezentii facinora subjungat Virgilius (*Æn.* VIII. 495):

Ergo omnis ¹furiis surrexit Etruria justis:

Regem ad supplicium præsentī morte repossunt.

Antiocheno, ex manuscripto libro viri æterna memoria dignissimi Nicolai Peirescii. (Pag. 846.)

^b *Ut Lacedæmone*] Plutarchus Ly-sandro (pag. 450): οἱ Σπαρτιῶται τῇ βασιλεῖ δικὴν προσέγραψαν θανάτην, ἣν οὐχ ὑποστὰς ἐκείνους εἰς Τεγέαν ἐφυγε: Spartiatæ regem ad capitis judicium vocarant, quod ille declinans fugit Tegeam. Idem Sulla (pag. 476): αὐτοὶ γὰρ τοὶ Σπαρτιῶται βα-

σιλεύοντες ἐνέλου ἀφελοντο τὴν ἀρχὴν, ὥς οὐ βασιλικούς, ἀλλὰ φαύλους καὶ τὸ μὴδὲν ὄντας. Quibusdam regibus Spartiatæ regnum ademerunt ut ineptis regno, quippe abjectis nihilique hominibus. De Agide injuste, sed damnato tamen, vide eundem Plutarchum. Mossyni regem inedia puniebant. Mela Lib. I. (cap. 19).

¹ *Furiis surrexit Etruria justis*] Et aruspex Etruscus in Mezentium insur-

VIII. But on this rule of non-resistance there are some remarks to be made.

First, those Rulers who are subject to the people, whether by original institution or by subsequent convention, if they transgress against the laws and the State, may not only be resisted, but put to death, as Pausanias at Lacedæmon. So Mezentius in Virgil is resisted.

IX. Secundo, si rex, aut alius quis imperium abdicavit, aut manifeste habet pro derelicto, in eum post id tempus omnia licent, quæ in privatum. Sed minime pro derelicto habere rem censendus est, qui eam tractat negligentius.

Lib. iv. 16.

X. Tertio, existimat Barclaius, si rex regnum alienet, aut alii subjiciat, amitti ab eo regnum. Ego hic subsisto. Nam talis actus, si regnum electione aut successoria lege deferatur nullus est: quæ autem nulla sunt, nullum habent juris effectum. Unde et de usufructuario, cui regem talem similem diximus, verior mihi videtur jurisconsultorum sententia, si extraneo jus suum cedat, 'nihil eum agere. Et quod dicitur ad dominum proprietatis reverti usumfructum, intelligendum legitimo tempore. Si tamen rex reipsa etiam tradere regnum aut subjicere molietur, quin ei resisti in hoc possit, non dubito. Aliud est enim, ut diximus, imperium; aliud habendi modus, qui ne mutetur, obstare potest populus: id enim sub imperio comprehensum non est: quo non male aptes illud Senecæ in re non dissimili; *Et si paren-*

Inst. de Usufr.
§ 3. *finitur.*
L. si *Usufructus*, 68.
D. de *Jure Dotium*.

Lib. III.
Controv. 9.

gentibus (Ibid. vers. 500):

Quos justus in hostem

Fert dolor.

⁴ Bene quidem Jure novo, quo traditio ad alienationem sufficiebat: sed non Jure veteri, quo *Cessio in jure*, extraneo facta, omnino usumfructum tollebat. Vide Celeberrimi NOODTII

eximium tractatum *De Usufructu*, Lib. II. cap. x. J. B.

^k *Si rex vere hostili animo in totius populi exitium feratur*] Pari de causa tribunus plebis qui sit, ipso jure desinere esse talem, ingeniose defendit Gracchus, cujus verba digna lectu apud Plutarchum (pag. 831, 832): Johannes Major

IX. Secondly, if the king or other ruler has abdicated his power, or manifestly regards it as *derelict*, lost to him, he may thenceforth be treated as a private person. But he is not to be regarded as possessing it as derelict, merely because he uses it negligently.

X. Thirdly, says Barclay, if the king alienates the kingdom or brings it into subjection to another, he forfeits it. At this I stop. Such an act, if the kingdom be elective or hereditary, is null; and an act which is null, cannot have any effect in law. I think that the law of the jurists concerning tenants for life, which tenants, as we have said, such kings resemble, is more applicable; namely, that if they transfer their right to another, the act has no effect. And when it is said that the tenant's interest reverts to the lord, it is to be understood that it does so at the legal time.

But if the king take measures to transfer or subject his kingdom to another, I do not doubt that he may be resisted in that design. The authority is one thing, the manner of holding it another; and the people may resist the latter being changed: for that is not compre-

dum in omnibus patri, in eo non parendum quo efficitur, ne pater sit.

XI. Quarto, ait idem Barclaius amitti regnum, ^ksi rex vere hostili animo in totius populi exitium feratur: quod concedo: consistere enim simul non possunt voluntas imperandi et voluntas perdendi: quare qui se hostem populi totius profitetur, is eo ipso abdicat regnum: sed vix videtur id accidere posse in rege mentis compote, qui uni populo imperet. Quod si pluribus populis imperet, accidere potest, ut unius populi in gratiam alterum velit perditum, ut colonias ibi faciat.

XII. Quinto, si regnum committatur, sive ex felonia in eum, cujus feudum est, sive ex clausula posita in ipsa delatione imperii, ut, ^lsi hoc aut hoc rex faciat, subditi omni obedientiae vinculo solvantur, tunc quoque rex in privatam personam recidit.

XIII. Sexto, si rex partem habeat summi imperii, ^mpartem alteram populus aut senatus, regi in partem non

in librum IV. Sententiarum dicit, non posse populum a se abdicare potestatem destituendi Principis in casu, quo ad destructionem vergeret: quod commode explicat ex his, quae hoc loco dicuntur.

^l Si hoc aut hoc rex faciat] Vide de regno Arragoniae Marianam libro VIIII.

^m Partem alteram populus aut senatus] Exemplum habes in Genuate republica apud Bizarum libro XVIIII. in Bohemia tempore Wenceslai [apud Du-brav.] Historiae libro X. Adde Azorium Institutionum Moralium libro X. cap. 8. et Lambertum Schafnaburgensem de Henrico IV.

hended in the authority. As Seneca says in a similar case; *We are to obey a father; but not in his wish to become not a father.*

XI. Fourthly, if the king act, with a really hostile mind, with a view to the destruction of the whole people, Barclay says that the kingdom is forfeited; for the purpose of governing and the purpose of destroying cannot subsist together: so that he who professes himself the enemy of the whole people, *ipso facto*, abdicates his kingdom. But this can hardly happen in a person of sound mind, who governs one people only. If he govern several peoples, he may wish to destroy one of them for the sake of another, that he may found colonies there.

XII. Fifthly, if the kingdom be bestowed by commission from a superior; and if the king either commit felony against the lord of the fief, or if there be a clause in the grant, that if the king do so and so, his subjects are released from the tie of obedience; then also the king falls back into a private person.

XIII. Sixthly, if the king have a part only of the Sovereignty,

suam involanti vis justa opponi poterit, quia eatenus imperium non habet. Quod locum habere censeo, etiamsi dictum sit, belli potestatem penes regem fore: id enim de bello externo intelligendum est: cum alioqui quisquis imperii summi partem habeat, non possit non jus habere eam partem tuendi: quod ubi fit, potest rex etiam suam imperii partem belli jure amittere.

XIV. Septimo, si in delatione imperii dictum sit, ^{ut} certo eventu resisti regi possit, etiamsi eo pacto pars imperii retenta censi non possit, certe retenta est aliqua libertas naturalis, et exempta regio imperio. Potest autem qui jus suum alienat, id jus pactis imminuere.

XV. 1 Vidimus de eo, qui jus imperandi habet aut habuit. Restat ut de invasore imperii videamus, non postquam longa possessione aut pacto jus nactus est, sed quamdiu durat injuste possidendi causa. Et quidem dum possidet, actus imperii quos exercet, vim habere possunt obligandi, non ex ipsius jure, quod nullum est, sed ex eo quod omnino probabile sit eum qui jus imperandi habet, sive is est populus ipso, sive rex, sive senatus id malle, interim rata esse quæ imperat, quam legibus judiciisque sublati summam induci confu-

Vic. de Potest.
Civ. n. 23.
Suarez de
Legib. l. iii. 10.
n. 9. Less. de
Just. et Jur.
li. 29. Dub. 5.
n. 73.

^a *Ut certo eventu resisti regi possit*
Exempla vide apud Thuanum Historiarum cxxxi. in narratione anni c10

loc iv. et libro cxxxiii. in anno c10
loc v. utrumque de Hungaria: apud
Mejerum narratione anni c10 cccxxxix.

another part being in the Senate or the people, and if the king invade the part which is not his, he may justly be opposed by force, because in that part he has not authority. And this I conceive may be, although the law directs that the power of making war be in the king. For this must be understood of external war. And since each party has its portion of the Sovereignty, it must also have the right of defending that part. When this is the case, the king may lose his portion of the Sovereignty by the right of war.

XIV. Seventhly, if in conferring the royal authority, it be stated that in a certain event, the king may be resisted; although by that means there is not a part of the Sovereignty withheld, yet a certain natural liberty is retained by the subjects and exempted from the royal authority. He who alienates his right [as the people here does] may limit by compact the right so alienated.

XV. Next concerning Usurpers.

1 We speak now of an Usurper of the kingdom, not after he has by long possession or treaty acquired a Right, but so long as his possession remains illegitimate. And during such possession, the acts of

sionem. Improbatur Cicero Syllanas leges, ut crudeles in proscriptionum liberos, ne honores petere possent. Servandas tamen censuit, affirmans (ut nos docet Quintilianus) ita his Lib. II. 1. legibus contineri statum civitatis, ut his solutis ipsa stare non posset. Florus de ejusdem Sullæ actis: *Lepidus acta tanti viri rescindere parabat, nec immerito, si tamen posset sine magna clade reipublicæ.* Et mox: *Expediebat ægræ quasi sauciæque reipublicæ requiescere quomodocumque, ne vulnera curatione ipsa rescinderentur.* Lib. III. 23.

2 In his tamen, quæ ita necessaria non sunt, et pertinent ad raptorem in iniqua possessione firmandum, si sine gravi periculo potest non pareri, parendum non est. Sed an talem raptorem imperii vi dejicere, aut denique occidere liceat, quaeritur.

XVI. Ac primum, si bello injusto, et cui juris gentium requisita non adsint, imperium arripuerit, neque pactio ulla sequuta sit, aut fides illa data, sed sola vi retineatur possessio: videtur manere belli jus, ac proinde in eum licere, quod in hostem licet, qui a quolibet etiam privato jure potest interfici. *In reos majestatis, inquit Tertullianus, et publicos hostes* Apolog. 2. *omnis homo miles est.* Sic et adversus militiæ desertores,

in Brabantia et Flandria narratione anni cIo cccc lxxviii. in fœdere inter regem Galliæ et Carolum Burgundum.

Adde de Polonia, quæ habet Chytræus Saxoniorum xxiv. et de Hungaria Bonfinius Decadis iv. libro ix.

government which he exercises may have an obligatory force, not from his Right, which is null, but because it is probable that the legitimate governor would wish that it should be so, rather than that laws and tribunals should be abolished and confusion ensue. Cicero says that the laws of Sylla were highly cruel, yet he thought it necessary to preserve them. So also Florus judges.

2 But in matters which are not thus necessary, and which tend to strengthen the unjust possession of the Usurper, he is not to be obeyed, if he can be disobeyed without extreme danger.

XVI. But whether such an Usurper may be put down by [private] force, or put to death, is a question.

And first, if he have seized the kingdom by an unjust war, not legitimate according to the Law of nations, and no treaty has followed, it appears that the Right of War remains; and that everything is lawful against him which is lawful against an enemy, who may be slain even by a private person*. *Against traitors and public ene-*

* This is not the modern Law of War, which makes a distinction between *Combatants* and *Non-Combatants*. See *Elements of Morality*, vi. 1060.

C. Quando
liceat unicui-
que, Lib. II.

p. 570 c, d.
Tom. II.

cunctis jus pro quiete communi exercendæ publicæ ultionis indultum est.

XVII. Idem cum Plutarcho, qui ita sentit libro de fato ad Pisonem, statuendum censeo, si ante invasionem lex publice exstiterit, quæ unicuique potestatem facit occidendi eum, qui hoc aut illud, quod in aspectum cadit, ausus fuerit; puta qui privatus satellitium sibi circumdederit, arcem invaserit: qui civem indemnatum, aut non legitimo judicio necaverit: qui magistratus sine justis suffragiis creaverit. Tales leges multæ exstabant in Græciæ civitatibus, ubi proinde justa censenda fuit talium tyrannorum interfectio. Talis erat Athenis lex Solonis ⁵renovata post reditum ex Piræeo in eos, qui statum popularem sustulissent, aut eo sublato honores gessissent. Ut et Romæ ⁶lex Valeria, si quis injussu populi magistratum gereret: et lex consularis post decemvirale imperium, ne quis magistratum sine provocatione crearet: qui creasset, eum jus fasque esset occidi.

XVIII. Nec minus licebit invasorem imperii interficere, si diserta auctoritas accedat ejus, qui jus verum imperandi

⁵ Reperitur lex illa apud ANDROCI-
DEM, Orat. I. pag. 219, 220. Edit. Ha-
nov. J. B.

⁶ Lex Valeria] Plutarchus Publi-
cola (pag. 110): ἀνευ κρίσεως κτελ-
νειν τὸν βουλόμενον τυραννεῖν. Ut in-
judicatum occidere eum liceret qui domi-
natum concupisceret. Mox addit: εἰ τις
ἐπιχειροῖ τι τυραννεῖν Σόλων μὲν ἀλόγῃ
τὴν δίκην ἐπιτίθησιν, ὁ δὲ Ποβλικόλας
καὶ πρὸ τῆς κρίσεως ἀνελεῖν δίδωσι.
Solon ei, qui dominatum invadit, depre-
henso diem dici vult, ac Publicola etiam

ante judicium talem permittit interfici.
[Pag. 103 v, c. Vide potius Dion Ha-
licarnass. Ant. Rom. Lib. v. c. 19.]

⁶ Favonius ille erat amicus Bruti, et
dictum istud refertur a PLUTARCHO,
Vit. M. Bruti, pag. 989 A. J. B.

⁷ Tyrannum Nabidem relinquit] Quod Plutarchus in T. Quintii vita sic
explicat: ὡς εἴρα σὺν κακῷ μεγάλῳ
τῶν ἄλλων Σπαρτιανῶν ἀπολούμενον
τὸν τύραννον. Cum videret, sine gravi
aliorum Laconum malo non posse ty-
rannum destrui. (Pag. 376 E.) Non

mies, says Tertullian, every man is a soldier. So every one is allowed to do justice on those who desert the army.

XVII. The same may be true in virtue of a law, existing before the usurpation, which gave every one the right of killing him who did this or that before his eyes: for instance, surrounded himself with a body-guard, seized a fort, put a person to death without lawful judgment, made magistrates without the regular choice. Such laws existed at Athens and Rome.

XVIII. To kill the usurper will be lawful for one who has authority from the legitimate power: and along with such we must reckon the guardians of royal wards, as Jehoiada was to Joash, when they put down Athaliah, 2 Chron. xxiii.

habet, sive is rex est, sive senatus, sive populus. His annumerandi et regum puerorum tutores, qualis Joaso erat Joiada, *2 Paral. xxiii.* cum Athalias regno depelleret.

XIX. 1 Extra hæc ut privato vi dejicere aut interficere liceat summi imperii invasorem, probare non possum: quia fieri potest, ut is, qui jus habet imperii, malit invasorem in possessione relinqui, quam periculosus et cruentis motibus occasionem dari, qui plerumque sequi solent iis violatis aut interceptis, qui validam habent factionem in populo, aut externos etiam amicos. Certe an rem in id periculum adduci velit rex aut senatus, aut populus, incertum est, quorum sine cognita voluntate vis justa esse non potest. *6* Favonius dicebat: *χείρον εἶναι μοναρχίας ἀνόμου πόλεμον ἐμφύλιον, pejus esse bellum civile dominatu illegitimo.* Et Cicero, *Mihi pax omnis cum civibus bello civili utilior videtur.* Aiebat T. Quintius *sa-* *Philipp. ii. 15.*
tius fuisse Lacedæmone 7 tyrannum Nabidem relinqui, cum *Liv. xxxiv.*
aliter opprimi non posset quam ruina gravissima civitatis, in *49.*
ipsa vindicta libertatis perituræ. Nec alio spectat illud apud *Rom. v. 1431.*
Aristophanem, leonem in civitate non alendum, si alitus sit,
ferendum esse.

alienum est ab hac re quod Plutarchus refert Lycurgo, Laconem quandam cum legisset:

Ἰβανόντας ποτὶ τοὺς δε τυραννίδα χάλκεος Ἄρης

ἔβλε, δελινοῦντος δ' ἀμφὶ πόλεος ἔπεσον.

Hoc, dum Marte perant dominatum exstinguere, sævus,
 Ante belinuntis moenia Mars rapuit.

Respondisse, *δικαίως τεθνήσκοντι οἱ ἄνδρες. ἔδει γὰρ ἀφεμεν ἔλαν αὐτὰν κατακαῆμεν. Merito viri illi perire exspectare enim debuerant, ut ipse per*

se dominatus conflagraret. [Locus est pag. 52 x. Tom. 1. *Ed. Weck.* Sed sensum responsionis, male ab Interprete expressum, non mellius, quamquam alio modo, noster heic reddidit. Vertendum fuerat: *Merito perierunt illi; quia oportebat totam eam tyrannidem igne absumi permittere, non autem exstinguere, et sic servare.* Vide PALMERII *Exercit. in opt. Auct. Græcos*, pag. 186. Sic locus contrarium innuit ejus, quod Auctor putat. *J. B.*]

XIX. 1 In other cases than these, I cannot grant that it is allowable to a private person to put down by force, or to put to death, the usurper of a kingdom: for it may be that the legitimate governor would rather that the usurper should be left in possession, than that occasion should be given to dangerous and bloody movements, which generally follow, when those are killed who have a strong faction in the people, or have friends in other nations. Whether the legitimate government would wish that peril to be incurred, is uncertain; and without knowing their will, force is not justified. Cicero said, *To me any peace with my fellow-citizens seems better than civil war.* So Favonius, T. Quintius, in Livy: so Aristophanes. [See.]

Hist. iv. 67.

Lib. ix. ad
Att. Epist. 4.

2 Profecto gravissima cum sit deliberatio, libertas an pax placeat, ut Tacitus loquitur: et difficillimum hoc σκέμμα πολιτικὸν Ciceroni, εἰ τυραννουμένης τῆς πατρίδος παντὶ τρόπῳ τυραννίδος κατάλυσιν πειρατέον, καὶν μέλλῃ διὰ τοῦτο περὶ τῶν ὅλων ἢ πόλιν κινδυνεύειν; *An cum patria illegitimo imperio premitur, omnimodo danda sit opera ejus demendi, etiamsi civitas eam ob rem in summum discrimen adducenda sit?* non debent singuli, quod populi commune est, iudicium ad se rapere. Illud vero plane iniquum:

¹ Detrahimus dominos urbi servire paratæ.

App. Civ. i.
p. 384.

Sicut Sylla, interrogatus quid ita armatus patriam peteret, respondit, ἐλευθερώσω ἀπὸ τῶν τυραννούντων, ut eam a tyrannis liberem.

Epist. Fam.
i. Ep. 9.

Bell. Jug. 3.

p. 989 A.

De Offic. ii.
21.

3 Melius Plato epistola ad Perdiccam suadet, cujus verba Latine sic posuit Cicero: *Tantum contendere in republica, quantum probare tuis civibus possis: vim neque parenti, neque patriæ afferri oportere.* Qui sensus et apud Sallustium exstat: *Nam vi quidem regere patriam aut parentes, quanquam et possis, et delicta corrigas, tamen importunum est, cum præsertim omnes rerum mutationes cædem, fugam, aliaque hostilia portendant.* Unde non longe abit illud Stallii apud Plutarchum in vita Bruti: τῷ σοφῷ καὶ νοῦν ἔχοντι διὰ φαύλους καὶ ἀνοήτους κινδυνεύειν καὶ ταράττεσθαι μὴ καθήκειν· æquum non esse, ut vir prudens ac sapiens improborum et desipientium causa in pericula, et turbas se conjiciat. Huc et Ambrosii illud non male referas: *Adjuvat hoc quoque ad profectum bonæ existimationis, si de potentis manibus eripias inopem, de morte damnatum eruas, quantum sine perturbatione fieri potest; ne videamur jactantiæ magis facere causa quam misericordiæ, et graviora inferre vulnera, dum levioribus mederi desideramus.* Tho-

¹ Detrahimus dominos urbi servire μένους. Bello prætextum sumebat, liberare Græcos, libertatis non agentes. (Pag. 342 F.)
Plutarchus Catone Majore de Antiocho Magno: ἐποίησατο αὐτίαν τοὺς Ἕλληνας ἐλευθεροῦν, μηδὲν δεο-

2 Whether liberty or peace be better, is a most difficult point; on which individuals ought not to assume the office of judges. [See Tacitus, Cicero, Lucan (l. 351), Sylla in Plutarch *de Genio Socrat.* p. 576.]

3 So Plato says we are not to do violence to our country, or to our parents. So Sallust, Plutarch, Ambrose, Thomas Aquinas.

mas seditiosam esse dicit interdum quamvis tyrannici regimi-
nis destructionem. 2, 2 q. 42.
Art. 2.

4 Non debet movere nos in contrariam sententiam factum
Aodis in Eglonem regem Moabitarum: nam aperte testatur
sacra auctoritas, hunc a Deo ipso vindicem suscitatum, man-
dato scilicet speciali. Neque vero constat hunc Moabitarum
regem nullum jus imperandi ex pactione habuisse. Nam et in
alios reges Deus per quos volebat ministros sua judicia exse-
quebatur, ut per Jehu in Joramum. Jud. iii. 15.
Neh. ix. 27.

XX. Maxime autem in re controversa iudicium sibi
privatus sumere non debet, sed possessionem sequi. Sic tri-
butum solvi Cæsari Christus jubebat, ¹quia ejus imaginem
nummus præferebat, id est, quia in possessione erat imperii. 2 Reg. ix.
Matt. xxii. 20.

¹ Quia ejus imaginem nummus præ- sessionis. Vide in *Historia Genuate*
ferebat] Certissimum hoc indicium pos- Bizarum libro xviii.

4 The killing of Eglon king of Moab by Ehud, Judg. iii. 15, is
no precedent; he had a special mandate from God. So God in
other cases exercised his judgments, as by Jehu against Joram,
2 Kings ix.

XX. As a general consideration, a private person should not
assume the judgment of a controverted point, but follow possession.
So Christ commanded tribute to be paid to Cæsar because his image
was on the coin, that is, because he was in possession of the empire.

CAPUT V.

QUI BELLUM LICITE GERANT.

- I. *Belli causas effectrices alias* *vos et subditos.*
esse principales in sua re : IV. *Naturæ jure neminem a bello*
 II. *Aut adjuvantes in aliena :* *prohiberi.*
 III. *Alias instrumentales, ut ser-*

I. **U**T in aliis rebus, ita et in voluntatis actionibus tria esse solent efficientium genera, principales, adjuvantes, et instrumenta. Causa effectrix principalis in bello plerumque est is, cujus res agitur : in privato privatus : in publico potestas publica, maxime summa. An et pro aliis nihil moventibus bellum moveri ab alio possit, alibi videbimus. Illud interim tenebimus, naturaliter quemque sui juris esse vindicem : ideo manus nobis datæ.

II. 1 Sed et alteri prodesse quæ possimus non licitum modo, sed et honestum est. Recte qui de officiis scripserunt, aiunt, nihil esse homini utilius homine altero. Sunt autem diversa hominum inter se vincula, quæ ad mutuam opem invitant : nam et cognati ad opem ferendam coeunt, et vicini inclamantur, et qui ejusdem civitatis sunt participes ; unde illud : *Porro Quirites, et quiritari*. Aristoteles dixit, oportere quemque aut pro se arma sumere, si injuriam acceperit,

Lib. vii. D.
 de Serv.
 Export. DD.
 ad Lib. vii.
 D. de Furt.
 Lib. v. C. de
 Jure Fidei.
 Cic. ii. de
 Offic. 3.

Rhet. ad
 Alex. 3.

* Solon] Verba hæc Plutarchus refert (Vit. Solon. p. 88 D) : τῶν πόλεων καλλίστα οικεῖται ἐκεῖνη ἐν ᾗ τῶν ἀδικουμένων οὐχ ἥττον οἱ μὴ ἀδικούμενοι προβάλλονται καὶ κολᾷζουσι τοὺς ἀδικούντας. Civitatum illa felicissime colitur, in qua qui injuriam non sensere, ei non minus quam qui sensere

CHAPTER V. Who may lawfully make war.

I. As in other things, so in the actions of the will, there are commonly three kinds of efficient causes ; the principal, the auxiliary, and the instruments. The principal effective cause in war is commonly he whose interest is concerned ; in private war, a private person ; in public war, a public power, generally a sovereign power. Whether war may be made by another, for those who do not themselves stir in it, we shall see elsewhere. In the mean time we hold by this maxim ; that by Natural Law, every one is the vindicator of his own right : this is what hands were given for.

II. 1 But further : to help another when we can, is not only lawful but proper. Those who have written of Duties, rightly say that nothing

aut pro cognatis, aut pro benefactoribus, aut sociis injuria affectis auxilia ferre. Et ^a Solon docuerat beatas fore respublicas, in quibus alienas injurias quisque suas existimaret.

2 Sed ut cetera desint vincula, sufficit humanæ naturæ communio. Ab homine enim nihil humani alienum est. Menandri dictum est [Apud Stob. Tit. XLIII.]:

Injuriarum si improbis auctoribus
Reponeremus ultionem singuli,
Nobis putantes fieri quod fit alteri,
Inter nos juncti conspiratis viribus,
Non prævaleret innocentis impetus
Audax malorum; qui custoditi undique
Jussique poenas quas merentur pendere,
Aut nulli penitus essent, aut pauci admodum.

Democriti vero hoc: Ἰδιουμένωνοισι τιμωρεῖν κατὰ δύναμιν
χρὴ καὶ μὴ παρίεναι τὸ μὲν γὰρ τοιοῦτο δίκαιον καὶ ἀγα-
θόν. Injuria oppressos defendere pro viribus oportet, et non
negligere: illud enim justum bonumque est. Quod sic ex-
plicat Lactantius: Deus, qui ceteris animalibus sapientiam
non dedit, naturalibus ea munimentis ab incursu et periculo
tutiora generavit. Hominem vero quia nudum fragilemque
formavit, ut eum sapientia potius instrueret, dedit ei præter
cetera hunc pietatis affectum, ut homo hominem tueatur,
diligat, foveat, contraque omnia pericula et accipiat, et
præstet auxilium.

se opponunt, et injuriam captantes pu-
niant. Hoc et illud pertinet Rudente
Plantii: Prætorque injuria prius col-
lum, quam ad vos perueniat. (Act. III.

Scen. II. vers. 12).

¹ Est etiam hoc apud STOBÆUM,
Serm. XLVI. J. B.

Bart. in l. Ut
rim. D. de
Just. et Jur.
n. 7. 8. Jas.
Ibid. n. 29.
Cast. ad Lib.
1. § 4. eodem.
Bart. ad l. ho-
stes. D. de
Capt. n. 9.
Innoc. ad c.
Sicut. de
Jurjur. et
in c. oim. de
Res. Spol.
n. 16.
Panorm. n.
18.
Sylvest. in
Verb. Bell.
q. 8.

Lib. vi. 10.

is so useful to man as other men. But there are various ties of men to men, which invite them to mutual aid. Relatives in blood unite for mutual help, and neighbours are called upon for aid, and fellow-citizens. Hence the Roman cry in sudden distress, *Porro Quirites, et quiritari*. *Up Romans, for Romans*. Aristotle says that every one ought to use arms for himself, if he has received an injury, or to help relatives, benefactors, allies who are injured. And Solon taught that a State was fortunate, in which every one thinks the injuries of others his own.

2 If other ties are wanting, the tie of a common human nature is sufficient. Nothing belonging to mankind is indifferent to man. So Menander, Democritus, Lactantius.

III. Instrumenta cum dicimus, non arma hic intelligimus, et si quæ sunt his similia, sed eos qui ita agunt sua voluntate, ut ea voluntas ab altera pendeat. Tale instrumentum est patri filius, pars quippe ejus naturaliter: tale et servus, quasi pars ex lege: ²nam sicut pars non tantum pars est totius eadem relatione, qua totum est totum partis, sed hoc ipsum quod est totius est: ita possessio est aliquid ipsius possidentis. Democritus: ³*οἰκέτησιν ὡς μέρεσι τοῦ σκήνεος χρῶ ἄλλω πρὸς ἄλλο*. *Famulis tanquam partibus corporis aliis ad aliud utere.* Quale autem in familia est servus, tale in republica est subditus, ac proinde instrumentum imperantis.

IV. Nec dubium quin naturaliter omnes subditi bello adhiberi possint, sed quosdam specialis lex arcet, ut olim ^bRomæ servos, nunc passim ^cclericos: quæ tamen lex, ut omnes ejus generis, cum summæ necessitatis exceptione intelligenda est. Et hæc quidem generaliter de adiutoribus et subditis dicta sunt: nam quæ specialia sunt, suis locis tractabuntur.

^a Ratio illa, e veteris Philosophiæ placitis popularibus petita, et subtili præterea argumentatione fulta, parum hodie satisfaciet. Dicendum simpliciter, Filium aut Servum haberi pro Instrumentis, quum ita agunt, aut agere creduntur, jussu Parentis aut Domini, ut absque eo non acturi fuissent ipsi sponte sua. Videri possunt, quæ de triplici genere Causarum ad actum alienum concurrentium scripsimus in Notis ad ultimas Editiones Versionis nostræ Gallicæ libelli Pufendorfiani *De Officio Hom. et Civis*, Lib. I. cap. 1, § 27. seu ultimo. *J. B.*

^a Apud STOBÆUM, *Serm. LXII. J. B.*

^b *Romæ servos*] Servus ad IX. *Æneidos.* (Vers. 547).

^c *Clericos*] Ac Levitæ olim extra belli munia, ut notatum Josepho: (*Ant. Jud. Lib. III. cap. 12, § 4. Edit. Hudson.*) De clericis vide Nicetam Choniasten libro VI; Caroli Calvi Capitulum in Sparnaco XXXVII; in Gratiano c. clericum. dist. L. et causa XXIII. questione VIII. Et canones quidem sic habent: sed quanto illi servati a Græcis quam a Latinis diligentius, vide Annam Comnenam. [Lib. X. cap. 8. § 7].

III. When we speak of Instruments, we do not here mean weapons or the like, but voluntary agents, whose will is moved by the will of another. Such an Instrument is a son to a father, a servant to a master: So Democritus. So a subject in a State is the instrument of the Ruler.

IV. By Natural Law all subjects may take part in war; but some are excluded by special law, as slaves formerly among the Romans, and clerical persons now. Which law, like all of that kind, is to be understood with an exception of extreme necessity.

And so much generally of auxiliaries and subjects: special considerations will be treated in their own place.

Lib. xxii. esp.
de Agriculis,
xi. et iv. ad
i. Jul. de
adult. Sen. 1.
Controv. 4.
Aristot. Eth.
Nicom. v. 10.

Thom. II. 2.
40. Art. 2.
Sylvest. de
Bell. p. 3.

HUGONIS GROTII

DE JURE BELLI AC PACIS.

LIBER SECUNDUS.

CAPUT I.

DE BELLII CAUSIS, ET PRIMUM DE DEFENSIONE SUI ET RERUM.

- | | |
|---|--|
| <p>I. <i>Causæ belli justificæ quæ dicantur.</i></p> <p>II. <i>Eas oriri ex defensione, actione ejus, quod nostrum est, aut nobis debetur, aut ex pœna.</i></p> <p>III. <i>Pro vita defendenda bellum esse licitum.</i></p> <p>IV. <i>Contra aggressorem solum.</i></p> <p>V. <i>In periculo præsentis et certo, non opinabili.</i></p> <p>VI. <i>Item pro integritate membrorum.</i></p> <p>VII. <i>Maxime pro pudicitia.</i></p> <p>VIII. <i>Licite omitti defensionem.</i></p> <p>IX. <i>Defensionem illicitam esse interdum adversus personam publicæ valde utilem, ob legem dilectionis.</i></p> <p>X. <i>Interfectionem Christianis non esse licitam ad arcendam aliam, aut contumeliam</i></p> | <p><i>similem, aut ne fugiatur.</i></p> <p>XI. <i>Pro rebus defendendis interfectionem non esse illicitam jure naturæ.</i></p> <p>XII. <i>Quatenus ea permissa sit lege Moysi.</i></p> <p>XIII. <i>An et quatenus Evangelica lege permissa sit.</i></p> <p>XIV. <i>An læs civilis, interfici aliquem defensionis causa permittens, jus det, an solam impunitatem, cum distinctione explicatur.</i></p> <p>XV. <i>Quando licita esse possit singularis dimicatio.</i></p> <p>XVI. <i>De defensione in bello publico.</i></p> <p>XVII. <i>Eam non licitam ad imminuendam dumtaxat potentiam vicini.</i></p> <p>XVIII. <i>Nec in eo, qui justam bello causam dedit.</i></p> |
|---|--|

I. 1 **V**ENIAMUS ad causas bellorum: justificas intelligo: nam sunt et aliæ quæ movent sub ratione utilis, distinctæ interdum ab iis quæ movent sub ratione justi: quas inter se, et a ^a belli principiis, quale erat cervus in bello

^a *Belli principiis*] Exordia pugne dixit Virgilius. (*Æn.* VII. 40.)

CHAPTER I. *Of the Causes of War; and first of Self-defense, and Defense of our Property.*

I. 1 Let us come to the causes of war; I mean justificatory causes; for there are causes which operate on the ground of utility, distinct

Hist. iii. 6, 7. Turni et Æneæ, accurate distinguit Polybius. At quamquam manifestum est harum rerum discrimen, voces tamen confundi solent. Nam quas causas dicimus justificas, etiam
Lib. xiv. 22. principia dixit Livius in Rhodiorum oratione: *Certe quidem vos estis Romani, qui ideo felicia esse bella vestra, quia justa sint, præ vobis fertis, nec tam exitu eorum quod vincatis, quam principiis, quod non sine causa suscipiatis gloriamini.* Eodemque sensu ἀρχὰς πολέμου dixit Ælianus libro xii. capite 53, et Diodorus Siculus libro xiv. de bello agens Lacedæmoniorum in Eleos easdem vocat *ἑκ προφάσεις* et ἀρχάς.

2 Hæ justificæ causæ proprie nostri sunt argumenti, ad
Lib. viii. 8. quas illud pertinet Coriolani apud Halicarnassensem: *πρῶτον ὑμῖν παραινῶ σκοπεῖν, ὅπως εὐσεβῇ καὶ δίκαιαν πορίσησθε τοῦ πολέμου πρόφασιν: Id primum vobis curandum arbitror, ut piam et justam accipiat is belli causam.* Et hoc Demosthenis: *ὥσπερ οἰκίας, οἶμαι καὶ πλοίου, καὶ τῶν ἄλλων τῶν τοιούτων τὰ κάτωθεν ἰσχυρότατα εἶναι δεῖ, οὕτω καὶ πράξεων τὰς ἀρχὰς καὶ τὰς ὑποθέσεις ἀληθεῖς καὶ δικαίας εἶναι προσήκει.* *Sicut in domibus, et navigiis, rebusque similibus,*

^b *Vos estis Romani*] Certe vix ulla gens tam diu constans mansit in spectandis belli causis. Polybius apud Suidam voce ἐμβάλλειν^c [ubi tamen non legitur nomen Historici, nec alterius, quisquis auctor est verborum illorum.] οἱ γὰρ Ῥωμαῖοι πρόνοιαν ἐποιοῦντο μηδέποτε πρότεροι τὰς χεῖρας ἐπιβάλλειν τοῖς πέλας· ἀλλ' αἰεὶ δόκειν ἀμυνόμενοι ἐμβάλλειν εἰς τοὺς πολεμίους. [Apud Suidam est πολέμου.] Romani sumptuose id curarunt, ne priores ipsi finitimis inferrent violentas manus. Sed ut semper crederentur in hostem ire ad arcendas injurias. Ostendit id Dion [Immo Diodorus Siculus, pag. 314, 316, *Excerptorum* laudatorum] egregia com-

paratione Romanorum cum Philippo Macedone et Antiocho in excerptis Peirescianis. Ejusdem est illud in excerptis legationum: [Fulvii Ursini, ubi legitur: διὰ τὸ] διὰ τοὺς παλαιούς οὐδὲν οὕτω σπουδάζειν, ὥς τε δικαίους ἐφίστασθαι πολέμους. [Ubi videtur legendum, ἐνίστασθαι, ut in loco sequ.] Rursum in excerptis Peirescianis: σφόδρα οἱ Ῥωμαῖοι φιλοτιμοῦνται δικαίους ἐνίστασθαι τοὺς πολέμους, καὶ μηδὲν εἰκῇ καὶ προκετῶς περὶ τῶν τοιούτων ψηφίζεσθαι. Valde id student Romani, justa ut bella suscipiant, nihilque tale discernant sine causa ac temere. (Pag. 341, quæ ex Diodoro etiam.)

^c Προφάσεις] Δικαιώματα dixit

from those which depend on justice; and these again may be distinguished from occasional causes, or the first collision, as the stag in the war of Turnus and Æneas. These are sometimes confounded. [See Polybius, Livy, Elian, Diodorus.]

2 These justificatory causes are properly our subject. The necessity of just causes for war is acknowledged. [See Dionysius, Demosthenes, Dio Cassius, Cicero.]

quæ substerminuntur firmissima esse oportet, ita in actionibus causas ac fundamenta oportet justo ac vero congruere. Nec minus hoc Dionis Cassii: *δεῖ δὲ τοῦ δικαίου πᾶσαν ἡμᾶς πρόνοιαν ποιεῖσθαι. μετὰ μὲν γὰρ τούτου καὶ ἡ παρὰ τῶν ὀπλων ἰσχὺς εὐελπίς ἐστιν. ἄνευ δ' ἐκείνου βέβαιον οὐδέν, καὶν παραντίκα τις κατορθώσῃ τι, ἔχει·* *maxima nobis iustitiæ habenda est ratio: quæ si adsit, vis bellica spem bonam præbet: sin absit, nihil quis certi habet, etiamsi prima ex sententia succedant.* Et illud Ciceronis: *illa bella injusta sunt, quæ sunt sine causa suscepta: qui et alibi Crassum reprehendit, quod Euphratem transire voluisset* ^{De Rep. III. [[Vide not. c.]]} *⁹ nulla belli causa.* ^{De Finib. III. 22.}

3 Quod non minus de bellis publicis quam privatis verum est. Hinc illa Senecæ querela: *Homicidia compescimus et singulas cædes? quid bella et occisarum gentium gloriosum scelus? Non avaritia, non crudelitas modum novit. . . . Ex senatusconsultis plebisque scitis sæva exercentur, et 'publice jubentur vetita privatim.* ^{Epist. xcv.} Habent quidem bella publica auctoritate suscepta aliquos effectus juris, ut et sententiæ: de quibus agendum infra erit: Sed non eo magis peccato vacant,

Procopius Gothicorum III. (cap. 33.) Adde quæ infra hoc libro capitis XXII. initio.

^a Ὑποθέσεις] Sic et ὑποθέσεις belli dixit Julianus secundo de laudibus Constantii. (Pag. 95 B.)

^c Nulla belli causa] Appianus (Bell. Civ. Lib. II. p. 438) eidem Crasso a Tribunis denuntiatur dicit *μη πολεμεῖν τοῖς παρθαλοῖς μηδὲν ἀδικοῦσιν· ne bellum Parthis inferret nulla injuria cognitis.* Plutarchus de eodem: *καὶ συνίσταντο πολλοὶ χαλεπαίνοντες ἅλτις ἀνθρώποις οὐδὲν ἀδικοῦσιν, ἀλλ' ἐντοπύδοις πολεμήσουσιν ἀπεισι·* *Coibant multi indignantes, esse aliquem, qui bel-*

latum iret in homines non modo nullius injuriæ compertos, sed et pace defensos. (Vit. M. Crass. pag. 552 E.) [Locus autem Ciceronis, qui hic præcedit, a Lib. III. de Rep. nullibi, puto, ita legitur. Sed apud AUGUSTIN. De Civ. Dei, XXII. 6. ex eodem Libro hæc adferuntur: *Nullum bellum suscipitur a civitate optima, nisi aut pro fide, aut pro salute.* J.B.]

^f Publice jubentur vetita privatim] Idem Seneca de Ira II. cap. 8. *Pro gloria habita, quæ, quamdiu opprimi possunt, scelera sunt.* Adde quæ infra ex Seneca et Cypriano libro III. cap. 4. § 6. circa finem.

3 Just cause is requisite for public no less than for private war. Seneca complains that the State forbids homicide on a small scale, but commands it on a large one. It is true that wars undertaken by public authority have peculiar jural effects, as public sentences have; but they are not therefore blameless, except there be a reason for them. If Alexander made war on the Persians without cause, he was rightly called a robber by the Scythians, by Seneca, by Lucan, by

Curt. vii. 8.
n. 19.
Phars. x.
v. 21.

Lib. iii. 18.

De Civ. Del.
Lib. v. 4.

Lib. i. de
Falsa Relig.
18.

Sylvest. de
Bell. p. 1. n. 2.

De Civ. Del.
xix. 7.

Livius i. 32.

ni causa subsit; ut merito Alexander, si sine causa in Persas et alias gentes bellum arripuit, Scythiis apud Curtium, sed et Senecæ latro, Lucano prædo appelletur, Indorum quoque sapientibus ἀτάσθαλος, et a pirata quondam tractus sit in criminis societatem: quomodo et ab ejus patre Philippo duos Thraciæ reges regno spoliatos Justinus narrat, fraude latronis ac scelere. Augustini illud huc pertinet: *Remota justitia quid sunt regna, nisi magna latrocinia?* Convenit talibus Lactantii illud: *inanis gloriæ specie capti, sceleribus suis nomen virtutis imponunt.*

4 Causa justa belli suscipiendi nulla esse alia potest nisi injuria. *Iniquitas partis adversæ justa bella ingerit*, inquit idem Augustinus, ubi iniquitatem dixit pro injuria, quasi ἀδικίαν dixisset, cum vellet dicere ἀδίκημα. Sic in Romano Feciali carmine: *Ego vos testor, populum illum injustum esse, neque jus persolvere.*

II. 1 Ac plane quot actionum forensium sunt fontes, totidem sunt belli: nam ubi judicia deficiunt, incipit bellum. Dantur autem actiones aut ob injuriam non factam, aut ob factam. Ob non factam, ut qua petitur cautio de non offen-

Senecæ latro] Locus est de Benef. i. cap. 13. Non male Justinus Martyr, Apologetico i. [p. 21]. τοσούτων δὲ δύνανται ἄρχοντες πρὸ τῆς ἀληθείας δόξαν τιμῶντες, ὅσον καὶ ληστὰς ἐν ἐρημίᾳ. *Tantum possunt principes, qui opiniones vero præferunt, quantum in solitudine latrones*: Philo: οἱ τὰς μεγάλαις ἐργαζόμενοι κλοπαῖς, σεμνοῖς ὀνόμασιν ἀρχῆς ἐπικρύπτοντες ληστείαν ἀληθέστερον. *Qui magna furtia committunt, qui honesto principatus no-*

mine obumbrant ea, quæ re ipsa nihil nisi latrocinia sunt. (De Decalog. Pag. 763 n.)

¹ Habet ex ARRIANO, De Exped. Alex. Lib. vii. cap. 1. J. B.

² Refertur id a NONIO MARCELLO, e Lib. iii. Ciceron. de Republ. Nam quum quaereretur ex eo [Pirata] quo scelere compulsus mare haberet infestum uno myoparone: Eodem, inquit, quo tu [Alexander] orbem terræ. In voc. Myoparo, pag. 534. Vide etiam Augustin.

the Indians; and treated as an equal by a pirate. Philip his father did the like. Augustine says, *Without justice what is empire, but robbery on a great scale?* So Lactantius.

4 A just cause of War is injury done us, and nothing else. Augustine says, *The Injustice (that is the injury) of the adverse party makes a war just.* The formula of the Roman Heralds [in declaring war] was, *I call you to witness that that people is unjust, and does not perform its obligations.*

II. 1 There are evidently as many sources of war as there are of Actions at law; for when the judgments of tribunals cease to be of force, war begins. Now Actions are either on account of injury done, or not yet done: Actions for injury not yet done, are when

dendo, item damni infecti, et interdicta alia ne vis fiat. Ob factam, aut ut reparetur, aut ut puniatur: quos duos obligationum fontes ^hrecte distinguit Plato ³nono de legibus. Quod reparandum venit, aut spectat id quod nostrum est vel fuit, unde vindicationes et condictiones quædam: aut id quod nobis debetur sive ex pactione, sive ex maleficio, sive ex lege, quo referenda quæ ex quasi contractu et quasi maleficio dicuntur; ex quibus capitibus nascuntur condictiones ceteræ. Factum ut puniendum parit accusationem et judicia publica.

2 Plerique bellorum tres statuunt causas justas, defensionem, recuperationem rerum, et punitionem: quæ tria in Camilli ad Gallos denuntiatione invenias: *Omnia quæ defendi, repetique, et ulcisci fas sit*; in qua enumeratione nisi vox recuperandi sumatur laxius, omissa est persecutio ejus, et quod nobis debetur; quam non omisit Plato, cum dixit bella geri non modo, si quis vi opprimatur, aut expiletur, verum etiam si deceptus fuerit. Quicum illud Senecæ convenit: *Æquissima vox est, et jus gentium præ se ferens, Redde, quod debes*. Et in Fecialium formula erat: *Quas nec dederunt, nec solverunt, nec fecerunt, quas res dari, fieri, solvi*

Bald. ad Lib.
2. c. de Servit.
et ag. n. 71.
W. Matt. de
Bell. Just. et
Lict.
Liv. v. 49.

Alcib. l. p.
100 A.

De Benef. iii.
14.
Liv. l. 32.

De Civit. Dei, iv. 4. J. B.

^h Recte distinguit Plato] Et ante eum Homerus: nam cum mulctam persolvere proci Penelopes voluissent, ait Ulysses [Odys. Lib. xxii. vers. 62, et seqq.]:

οὐδ' εἰ μοι πατρίδα πάντ' ἀποδοῖτε
Ὅσσα τε νῦν ὑμῖν ἐστὶ καὶ εἶποθεν ἀλλ'
ἐπιθεῖν,
Οὐδέ κεν εἴ τις χεῖρας ἑμὰς λήξαιμι φόνοιο,
Πρὶν πάσαν μνηστῆρας ὑπερβασίην ἀποτίσαι.

patrias non si mihi raptas

Restituatis opes, addatisque altera plura,
Abstinere fedare manus in sanguine vestro,
Cuncta prius quam vestra proci delicta luat.
Cassiodorus, Lib. v. Eplat. 35: *Ut qui vindictam remisimus, damna minime sentiamus*. Adde quæ infra hoc libro initis capitulum xvi. et xx.

³ Locus esse videtur, ubi Philosophus ait, Legislatorem ad duo adtendere debere, injuriam, et damnum: Κα

security is sought that an offense shall not be committed, or that reparation shall be made for an incumbent loss, or an injunction that no force be used. Actions for injury done, are either that it be repaired, or punished; injury to be repaired regards either what is or was ours, as when we reclaim our property, or claim an obligation; or it regards what is owing to us, either by contract, or for wrong done us, or by appointment of law. An act regarded as punishable gives rise to accusation and public trial.

2 Most writers state three just causes of war; defense, recovery of property, and punishment of wrong; which three we find mentioned in the proclamation of Camillus against the Gauls: *All that we may lawfully defend, recover, revenge*. [Compare this with Plato and Seneca.] The formula of the Roman Heralds was, *What things were*

Lib. III. Frag.
cap. 10. Oral.
Macr. Libell.
Lib. VI. q. 10.
super Josue.

oportuit: et apud Sallustium in historiis: *Jure gentium res repeto*. Augustinus cum dixit: *Justa bella definiri solent, quæ ulciscuntur injurias*: vocem ulciscendi generalius sumsit pro eo, quod est demere: quod et sequentia ostendunt, in quibus non est enumeratio partium, sed exemplorum additio: *Sic gens et civitas petenda est, quæ vel vindicare neglexerit, quod a suis improbe factum est, vel reddere, quod per injurias ablatum est*.

Lib. II. p. 74

Lib. v. 35.

Anal. Post.
II. 11.

Lib. VII. 6.

3 Hanc naturalem notitiam secutus Indorum rex, narrante Diodoro, Semiramidem accusabat, *ὅτι προκατάρχεται τοῦ πολέμου μηδὲν ἀδικηθεῖσα*: quod bellum inchoaret nulla accepta injuria. Sic et Romani cum Senonibus postulant, ne a quibus nullam injuriam accepissent, eos oppugnarent. Aristoteles Apodicticon II. cap. 11. *πολεμοῦσι γὰρ τοῖς πρότερον ἀδικήσασι*: Bellum sumi solet in eos, qui priores injuriam fecerunt. De Abiis Scythis Curtius: *Justissimos barbarorum constabat: armis abstinebant nisi lacessiti*. Prima igitur causa justī belli est injuria nondum facta, quæ petit aut corpus, aut rem.

Sylv. in Verb.
Bell. part. 1.
n. 3. et p. 2.

III. Si corpus impetatur vi præsentē cum periculo vitæ non aliter vitabili, tunc bellum esse licitum etiam cum inter-

πρὸς δύο ταῦτα δι' βλεπτέον, πρὸς τε ἀδικίαν, καὶ βλάβην. Vide quæ sequuntur, pag. 862, Tom. II. J. B.

¹ *Justa bella definiri solent*] Servius ad IX. *Æneidos de Romanis*: Cum volebant bellum indicare, pater patratus, hoc est princeps *Fœcialium*, proficiscebatur ad hostium fines: et præfatus quædam solemnia clara voce dicebat, se bel-

lum indicare propter certas causas: aut quia socios læserant, aut quia nec ab-repta animalia, nec obnoxios redderent. (Ad vers. 53.)

^k *Nisi lacessiti*] Plutarchus *Nicia* (Pag. 539 E): καὶ γὰρ τὸν Ἡρακλέα πάντων κρατεῖν ἀμυνόμενον καὶ προεπιχειρούμενον. *Herculem etiam cuncta subegisse, dum lacessitus se defendit*.

to be given, done, and discharged, they have not given, done, and discharged. [See Sallust; Augustine.]

3 Such is the natural feeling of Justice among nations. [See Diodorus, Livy, Aristotle, Curtius.]

Therefore the first cause of a just war is an injury not yet done which menaces body or goods.

III. If the body be menaced by present force with danger of life not otherwise evitable, war is lawful, even to the slaying of the aggressor, as we have before said, in proving some private war to be lawful. And this right of defense arises from the natural right of self-protection, not from the injustice or fault of another who makes the danger. And therefore this right of self-protection is not taken away, even if the aggressor be blameless; if, for instance, he be a

fectione periculum inferentis ante diximus, cum ex hac specie, ut maxime probata, ostendimus bellum aliquod privatum justum esse posse. Notandum est jus hoc defensionis per se ac primario nasci ex eo, quod natura quemque sibi commendat, non ex injustitia aut peccato alterius, unde periculum est. Quare etiamsi ille peccato careat, puta quod bona fide militet, aut alium me putet quam sim, aut quod insania aut insomniis agitetur, ut evenisse quibusdam legimus, non eo tollitur jus se tuendi, cum sufficiat, quod ego non teneor id, quod ille intentat, pati, non magis quam si bestia aliena periculum intentaret.

Bart. ad l. ut
Fim. D. de
Just. et Jur.
Bal. in Rep.
l. l. c. Unde
vi. Bann. ii.
q. 10. Art. 10.
Dub. ult.
Soto, iv.
Disp. 5. Art.
10. Valent.
ii. 2. Disp. 5.
q. 10. p. 7.

IV. 1 An et innocentes, qui interpositi defensionem aut fugam, sine qua evadi mors non potest, impediunt transfodi aut obteri possint, disputatur. Sunt qui licere id putant, etiam Theologi. Et certe naturam solum si respicimus, multo apud eam minor est societatis respectus quam propriæ salutis cura. At lex dilectionis, præsertim Evangelicæ, quæ alterum nobis æquat, plane id non permittit.

Card. q. 33.
Lib. 1.
Petr. Nav. xi.
3. n. 147.
Cajet. ii. 2.
Art. 67. q. 2.

2 Bene autem dictum est a Thoma, si recte accipiat, in vera defensione hominem non occidi ex intentione: non quod non interdum, si alia salutis non suppetat ratio, non

ii. 2. q. 64.
Art. 7.

Josephus xvii. *Antiquæ Historiæ*: οἱ παρελθόντες καὶ μὴ πρὸς [Legendum videtur πρὸς μὴ] διαπορευόμενοι ἄρχοντες ἀδικῶν ἔργων, οἱ δὲ εἰσὶν οἱ βιαζόμενοι καὶ μὴ θέλοντας τοὺς ἀμυνόμενους ἐφ' ὅπλα χωρεῖν. Qui in id veniunt, ut in nihil hostile cogitantes violentias inferant manus, hi sunt, qui invitos, cogunt ad arma semet tutature

confugere. (Cap. ix. § 6.)

* Sed illa alterum nobis non præfert, ut ipse Auctor observavit supra, Lib. i. cap. 3, § 3. num. 3. Ceteris paribus, sibi quisque proximus est. Et heic magis etiam valet, quod Auctor postea adfert e Thoma Aquinate, calculo suo adjecto. Vide de tota hac materia sui ipsius defensionis, PUFENDORFIUM nos-

soldier acting *bonâ fide*; or if he take me for another than I am, or if he be insane or a sleepwalker, such as we read of; it is sufficient that I am not bound to suffer what he attempts to inflict; just as if a wild beast were to attack me.

IV. 1 Whether innocent persons, who, interposing prevent the defense or flight without which death cannot be avoided may be cut down or trampled down, is a question. There are who think it lawful, even Divines. And certainly if we only look at Natural Law, that cares much less for ties of society, than for the defense of the individual. But the law of love, especially the Evangelical law, which commands us to regard another as ourselves, plainly does not permit this.

2 Thomas Aquinas well says, if it be rightly taken, that a man killed in self-defense is not killed by intention: not that sometimes,

liceat destinato id facere, unde mors aggressoris sit secutura, sed quod hic mors illa non eligatur, ut quiddam primario intentum, sicut in punitione judiciali, sed ut unicum, quod eo tempore suppetit; cum is qui impetitus jam est, etiam illo tempore malle debeat tale aliquid facere, quo alter absterreatur, aut debilitetur, quam quo intereat.

V. 1 ¹Periculum præsens hic requiritur, et quasi in puncto. Fateor quidem, si insultator arma arripiat, et quidem ita ut appareat eum id facere occidendi animo, occupari posse facinus: nam in moralibus, ut et in naturalibus punctum non invenitur sine aliqua latitudine: sed multum falluntur et fallunt, qui metum qualemcumque ad jus occupandæ interfectionis admittunt. Vere enim dictum est a Cicerone primo de officiis: plurimas injurias a metu proficisci, cum is, qui nocere alteri cogitat, timet, ne nisi id fecerit, ipse aliquo afficiatur incommodo. Clearchus apud Xenophontem: καὶ γὰρ οἶδα ἥδη ἀνθρώπους, τοὺς μὲν ἐκ διαβολῆς, τοὺς δὲ ἐξ ὑποψίας, οἱ φοβηθέντες ἀλλήλους, φθάσαι βουλόμενοι πρὶν παθεῖν, ἐποίησαν ἀνήκεστα κακὰ τοὺς οὔτε μέλλοντας, οὔτε βουλομένους τοιοῦτον οὐδέν· multos ego novi, qui calumnia adducti aut suspicionem, dum metuunt alios, et prævenire malunt quam perpeti, atrocissimis malis eos affecerunt, qui nihil tale facturi fuerant, ac ne cogitaverant quidem. Cato in oratione pro Rhodiensibus: quod illos dicimus voluisse

Cap. 7.

De Exp. Cyr.
II. 5.

Apud Aul.
Gell. vii. 3.

trum *De Jure Nat. et Gent.* Lib. II. cap. 5. J. B.

¹ *Periculum præsens*] Hujus distinctionis usum egregium vide apud *Aga-thiam* IV. [ubi de cæde Gubazi, c. 1. 2.] Apud Thucydidem *Octavo Phrynichus*: ὅτι ἀνεπίφθονον οἱ ἥδη εἰη περὶ τῆς ψυχῆς δι' ἐκείνους κινδυνεύοντι καὶ τοῦτο καὶ ἄλλο τι ἂν δρᾶσαι μᾶλλον ἢ ὑπὸ τῶν ἐχθίστων αὐτὸν διαφθαρή-

vai. Cariturum invidia, si ipse jam in vita per ipsos adductus periculum, et hoc et aliud quidvis aggrediatur potius quam ab hominibus inimicissimis perdisse sinat. [Locus est § 50. Sed ubi casus alius est, quam de quo hec agitur. J. B.]

² Ita quoque habet in *Excerptis ex Trag. et Com. Græcis*, pag. 390: quamquam verba ceteroquin non plane sint

if no other way of safety appear, it may not be lawful to do that of set purpose, which will cause the death of the aggressor, but that such death is not chosen as something primarily intended, as in judicial punishment it is, but it is chosen as the only thing which is then possible; since he who is attacked, even then ought to do anything by which the assailant may be scared away, or deprived of power, rather than by which he may be killed.

V. 1 Present danger is here required, and imminent in a point

facere, id nos priores facere occupabimus? Insignis est illa apud Gellium sententia: Gladiatorum composito ad pug-^{104.}
nandum pugna hæc proposita sors est, aut occidere, si oc-
cupaverit, aut occumbere, si cessaverit. Hominum autem
vita non tam iniquis, neque tam indomitis necessitatibus
circumscripta est, ut idcirco prior injuriam facere debeas;
quam nisi feceris, pati possis. Et apud Ciceronem alio loco
non minus recte: Quis hoc statuit unquam, aut cui concedi^{Ch. Quint. Inst. Or. v. 13.}
sine summo omnium periculo potest, ut eum jure potuerit
occidere, a quo metuisse se dicat, ne ipse posterius occide-
retur? Locum hic habet illud Euripidis:

Εἰ γὰρ σ' ἐμελλεν εἰς σὺ φῆς κτείνειν πόσις,
 Χρὴ καὶ σε μέλλειν, εἰς χρόνος δῆθεν παρήν.

Te si, ut ais, interficere vir voluit tuus,
 Voluisse sat erat et tibi, ubi tempus foret.

Cui geminum est Thucydideum illud: τὸ μέλλον ἐν ἀφανεί^{Lib. I. 42.}
 ἔτι κεῖται, καὶ οὐκ ἄξιον ἐπαρθέντας αὐτῷ φανεράν ἔχθραν
 ἤδη καὶ οὐ μέλλουσιν κτήσασθαι. *Futurum in incerto adhuc*
est: nec quæquam oportet eo commotum inimicitias susci-
pere, non jam futuras sed certas. Idem Thucydides quo loco^{Lib. III. 82.}
mala seditionum quæ Græcas civitates incesserant diserte ex-
plicit, ponit et hoc in vitio: ὁ φθάσας τὸν μέλλοντα κακὸν
τι δρᾶν ἐπηνείτο laudabatur qui malum facinus quod fac-
turus erat alter ipse occupasset. Livius: ^m Cavendo ne me-^{Lib. III. 65.}

eadem. Sed dicere debuit *meus*: loquitur enim *Merope* de viro suo, a *Polyponte* fratre interfecto. Fragmentum est e *Cresphonte*, apud *Aulum Gellium*, Lib. VII. c. 3. unde quædam supra addidit. *J. B.*

^m *Cavendo ne metuant homines, metuendos ultro se efficiunt* Ut *Cæsar*, qui cum rempublicam occuparet, dicebat adversariorum metu se eo adductum.

Locus est egregius apud *Appianum* *Civilium* II. [Nihil tale reperitur in toto illo libro nec alibi, quod sciam, apud *Appianum*. Videtur Auctor noster in animo habuisse quod aiebat *Jul. Cæsar* in literis ad *Senatum*, dum in armis esset *Pompeius*, iniquum fore, se cogi, ut ea deponeret, quippe qui sic hostibus traderetur: Apud *DION. CASSIUM*, Lib. XLII. tit. pag. 171 c. *Ed. H. Steph.*

of time. I confess indeed that if the aggressor be taking up weapons, and in such a way that he manifestly does so with the intent to kill, the deed may be anticipated; for in moral things, as in natural, there is no point without a certain latitude: but they are in great error who allow any fear [however slight] as a right of killing for prevention. It is well said by *Cicero* that most injuries proceed from fear, he who meditates hurting another, fearing that if he do not do so, he will suffer some evil. So *Clearchus* in *Xenophon*, *Cato* for the *Rhodians*.

Inst. Orat.
viii. 5.
Lib. iv. p. 640.

tuant homines, metuendos ultro se efficiunt, et injuriam a nobis repulsam, tanquam aut facere aut pati necesse sit, injungimus aliis. In tales non male convenit illud Vibii Crispi a Quintiliano laudatum, *Quis tibi sic timere permisit?* Etiam Livia apud Dionem ait, infamiam eos non effugere, qui facinus quod timent, occupant.

Bann. q. 64.
Art. 7. dub. 4.

2 Quod si quis vim non jam præsentem intentet, sed conjurasse aut insidiari compertus sit, si venenum struere, si falsam accusationem, falsum testimonium, iniquum judicium moliri, hunc nego jure posse interfici; si aut aliter evadi periculum potest: aut non certum satis est aliter evadi non posse. Plerumque enim interposita temporis mora ad multa remedia, ad multos etiam casus patet: ut dici solet, inter os et offam: quamquam non desunt et Theologi, et Jurisconsulti, qui indulgentiam suam longius extendant. Sed et

Neque enim APPIANUS, dict. Lib. ii. pag. 448. ubi de eadem re, nullam metus mentionem facit. Vitio memoriæ igitur Auctor duos istos Historicos inter se confudit. Adde dictum aliud ejusdem CÆSARIS apud SUETON. in *Jul. c. 30.* et PLUTARCHUM, *Vit. Cæs. p. 730 A. J. B.*

6 Innuit locum Deuter. xxii. 25, 26. unde tamen, si series orationis perpendatur, non potest elici, saltem directe, pudicitiam vitæ adæquari. *J. B.*

7 *Pudicitiam vitæ adæquet*] Seneca de *Beneficiis* primo, capite undecimo: *Proxima ab his sunt sine quibus possumus quidem vivere, sed ut mors potior sit, tanquam libertas, et pudicitia, et mens*

bona. Paulus Sententiarum v. tit. xxiii. § 3. *qui latronem cædem sibi inferentem, vel alium quemlibet stuprum inferentem occiderit, puniri non placuit. Alius enim vitam, alius pudorem publico facinore defendit.* Augustinus libro 1. de *Liberio Arbitrio*: *Lex dat potestatem vel viatori ut latronem, ne ab eo ipse occidatur, occidat; vel cuiquam viro aut femina ut violente sibi stupratorem irrudentem, aut post illatum stuprum, si possit, interimat.* [Cap. 5. Ita hunc locum Augustini Auctor noster landaverat; unde in sequentibus Edd. fecerant, ante aut post illatum stuprum &c. nulla necessitate, posito etiam sensu, quem Aucto-

[Sec.] Gellius says, a man is not to act like a gladiator, who must kill or be killed. So Cicero, quoted by Quintilian: Euripides, Thucydides, Livy. Quintilian quotes, *Who allowed you such fear?* And so Livia in Dio. [See.]

2 If any one direct against us violence not present; as if he make a conspiracy, or lay an ambush, or put poison in our way, or assail us with a false accusation, false testimony, or iniquitous judgment; I deny that he may be lawfully slain, if either the danger may be otherwise avoided, or it be not certain that it cannot be otherwise avoided. For delay allows recourse to many remedies and many chances; as we say, between the cup and the lip. Although there are not wanting both Jurists and Divines who extend the indulgence further. But the other opinion, which is the better and safer, is also not without its authorities.

altera, quæ melior tutiorque sententia est, suis non caret auctoribus.

VI. Quid dicemus de periculo mutilationis membri? Sane cum damnum membri, præsertim e præcipuis, valde sit grave, et vitæ quasi æquiparabile: adde quod vix sciri queat an non periculum mortis post se trahat, si aliter vitari nequeat, putem intentantem periculum occidi recte posse.

VII. Pro pudicitia quin idem liceat, controversiam vix habet, cum non tantum communis æstimatio, sed et lex ^odivina ^apudicitiam vitæ adæquet. Itaque Paulus Jurisconsultus dixit pudorem tali facinore recte defendi. Exemplum habemus in Tribuno Marii a milite occiso ^oapud Ciceronem et Quintilianum: sed et a feminis occisorum in historiis exstant. Chariclea apud Heliodorum talem interfectionem vocat ⁷ἀμύνης νόμον τῆς εἰς σωφροσύνην ὑβρεως, *justam defensionem ad arcendam injuriam in castitatem*.

tor putavit inesse; Sed ille sensus minime congruit cum serie orationis; unde SAMUEL RACHELIUS, *Tract. De Puellis*, § 23. recte hec observavit ἀμύνημα quoddam *μνημονικόν*: quum Editiones et recentiores, et vetustiores, habeant tantum: *ante illatum stuprum*. Ita et ultima Parisina, a Monachis Benedictinis curata. Sic etiam dudum locus adlatus est a CUSACIO, *Not. in Jul. Paul. Recept. Sent.* quamvis in Editione Cl. Schultingii, v. 23, 8, pag. 508. legatur, *aut ill. stupr.* mendo ex Editione Fabricii orto, et satis per se manifesto, et alie Editiones non illud arguerent.

^o *Apud Ciceronem*] Vide et Plutar-

chum *Mario*. [Pag. 413. Locus autem Ciceronis est *Orat. pro Mil.* c. 4. et Quintiliani *Declamatio*, cui titulus, *Tribunus Marianus*. J. B.] Mars quoque Deorum judicio absolutus dicitur, interfecto eo, qui filie ipsius stuprum inferebat. Testis Apollodorus bibliothecæ III. (Cap. xiii. § 2. *Ed. Gal.*) Adde insignem historiam apud Gregorium Turonensem libro nono.

⁷ Locus est in Lib. 1. non longe ab initia, ubi ita Virgo loquitur: "Ὅσοι δὲ πρὸς ἡμῶν [ἀνέστηθε] ἀμύνης νόμος καὶ ἐκδικίας καὶ εἰς σωφροσύνην ὑβρεως περὶόνετε. Pag. 7. *Edit. Bourdelot.* J. B.

VI. What shall we say of peril of mutilation of limb? Since the loss of a limb, especially of a principal one, is very grievous, and nearly equal to loss of life; and since, moreover, it can hardly be known whether it do not bring in its train loss of life; if it cannot otherwise be avoided, I think the author of such danger may be slain.

VII. Whether the same be lawful in defense of chastity, can scarcely be doubted, since not only common estimation, but the divine law, makes chastity of the same value as life. [He refers to Deut. xxii. 25, *If a man find a betrothed damsel in the field, &c., the man shall die*; which J. B. observes, hardly justifies his saying that chastity is on a par with life.] And so Paulus the Jurist decided. An example occurs in a Tribune of Marius, killed by a soldier, in

Soto, d. l. q.
Sylv. in Verb.
Bellum, p. 2.
n. 5.

VIII. Quod autem diximus supra, quanquam occidere parantem occidere licet, laudabilius tamen eum facere qui occidi quam occidere malit, id nonnulli ita concedunt, ut excipiant personam multis utilem: Sed mihi hanc patientiæ contrariam legem omnibus illis imponere, quos vivere aliorum interest, parum tutum videtur. Itaque restringendum id arbitrer ad eos, quorum officium est ab aliis vim arcere, quales sunt socii itineris ea lege contracti, et rectores publici, quibus illud Lucani aptari potest [Lib. v. vers. 685, et seqq.] :

^p Cum tot ab hac anima populorum vita salusque
Pendeat, et tantus caput hoc sibi fecerit orbis,
Sævitia est voluisse mori.

Soto, d. loco.

IX. 1 Contra vero evenire potest, ut quia inuasoris vita multis sit utilis, occidi is sine peccato nequeat: nec id tantum ex vi legis divinæ, sive veteris sive novæ, de quibus egimus supra cum regis personam sanctam esse ostendimus, sed ipso etiam naturæ jure. Nam jus naturæ, quatenus legem significat, non ea tantum respicit, quæ dictat justitia, quam explictricem diximus, sed aliarum quoque virtutum, temperantiæ, fortitudinis, prudentiæ actus in se continet, ut in certis circum-

^p Cum tot ab hac anima] Curtius
Lib. ix. *Sed cum tam avide manifestis
periculis offeras corpus, oblitus tot civium
animas trahere te in casum.* (Cap. 6.
num. 8).

^s At vero quemadmodum manifesta
est injuria, et intoleranda, Principis, qui
sine ulla causa privatum subditum in-
vadit, vitæ ipsius imminens: ita utilitas
ad Rempublicam reditura, si Innocens

Cicero and Quintilian. There are also examples of men in such cases killed by women. Such Chariclea in Hierocles justifies. [See.]

VIII. Though, as we have said, it be lawful to kill him who is preparing to kill, yet he acts more laudably who would rather be killed than kill; this is granted by some, making the exception of a person whose life is important to many. But to impose this rule, contrary to forbearance, on all whose lives concern other persons, seems very unsafe. It must, I think, be restricted to those whose duty it is to protect others from force; such as companies on the road, who are under such an engagement, and public Rulers: as Lucan says. [See.]

IX. 1 On the other hand, it may happen that because the life of the aggressor is useful to many, he cannot be killed without sin; and that, not only by the divine law, but by Natural Law. For Natural Law not only respects what corrective justice dictates, but also contains in itself acts of other virtues, as temperance, fortitude, prudence, as in certain circumstances not only good but obligatory. Now bene-

stantiis, non honestos tantum sed et debitos. Ad id vero, quod diximus, caritas nos obstringit.

2 Nec ab hac sententia dimovet me Vasquius, cum ait principem, qui innocentem insultet, desinere principem esse ipso facto: quo vix quicquam potuit dici aut minus vere aut magis periculose. Nam sicut dominia, ita et imperia non amittuntur delinquendo, nisi lex id statuatur. Quæ autem hoc de imperiis statueret lex, ut delicto in privatum amitterentur, nusquam reperta est, nec repertum iri credo: summam enim rerum confusionem induceret. Quod autem Vasquius et huic, et aliis multis illationibus fundamentum ponit, imperia omnia parentium non imperantium utilitatem spectare, id etiam si verum universim esset, ad rem non faceret: non enim statim res deficit, cujus utilitas aliqua in parte deficit. Quod vero addit, reipublicæ incolumitatem a singulis propter se desiderari, atque ideo debere quemque etiam toti reipublicæ suam salutem antepone, non satis cohæret. Nam nostri quidem causa rempublicam salvam esse volumus, sed non tantum nostri, verum et aliorum³.

Lib. i. Cont.
Illust. 18.

3 Falsa enim et a sanioribus philosophis rejecta est opinio⁴ existimantium amicitiam ex sola indigentia natam,

patiatur se interfici, dubia admodum est, ne quid gravius dicam. De ea re egimus uberius in nostris ad hunc locum Notis Gallicis. J. B.

⁴ *Existimantium amicitiam ex sola indigentia natam*] Refutat perniciosam hanc opinionem Seneca libro i. *de Beneficiis* capite i. et libro iv. cap. xvi.

violence binds to act as we have said.

2 Vasquius says that a prince, when he insults an innocent man, ceases to be a prince: but nothing can be less true or more dangerous. For as ownership, so political authority, is not lost by delinquency, except the law so direct. But there never was a law that such authority should cease by an offence against a private person; and I believe, never will be. And what Vasquius lays down as the foundation of this and many other inferences, that all authority looks to the good of those who obey, not of those who command, even if it were universally true, is nothing to the purpose. For a thing does not fail because its utility in some one point fails. What he adds, that the safety of the community is desired by each for his own sake, and therefore each must prefer his own safety to that of the community, does not hang together. For we desire the safety of the community for our own sake, but not our own sake only, but that of others also. [J. B. doubts whether this be conclusive.]

3 The opinion of those who think that friendship arises from need

cum sponte et natura nostra ad eam feramur. Ut vero meo unius bono multorum admodum bonum præferam; caritas monet sæpe, imperat interdum. Hic illud Senecæ pertinet: ^r *Principes regesque, et quicumque alio nomine sunt tutores status publici, non est mirum amari ultra privatas etiam necessitudines. Nam si sanis hominibus publica privatis potiora sunt, sequitur, ut is quoque carior sit, in quem se respublica convertit.* Ambrosius: *Sibi cum quisque arbitretur gravior exordia patriæ depulisse, quam propria pericula.* Is quem dixi Seneca: *Callistratus et Rutilius, hic Athenis, ille Romæ, reddi sibi penates suos noluerunt clade communi: quia satius erat duos unico malo affici, quam omnes publico.*

X. 1 Si cui periculum immineat accipiendæ alapæ, aut mali similis, huic quoque jus esse id arcendi cum cæde inimici, sunt qui putant. Ego, si mera justitia expletrix respiciatur, non dissentio. Quanquam enim inæqualia sunt mors et alapa, tamen qui injuria me parat afficere, is mihi eo ipso dat jus, hoc est, facultatem quandam moralem adver-

De Clement.
l. 4.

De Officiis,
lii. 3.

De Benef.
vi. 37.

Soto, d. loco.
Navarr. 16.
n. 3.
Sylv. in Verbo
Homicid. l.
g. 2.
Lud. Lopez.
62.

^r *Principes regesque*] Plutarchus *Pelopides* initio (pag. 278 D): ἀρετῆς πρῶτον ἔργον σώζειν τὸν ἅπαντα ἀλλὰ σώζοντα: primum virtutis opus servare servantem cætera. Cassiodorus de Amicitia: Si manus oculorum obsequio vibratum in aliud membrum senserit gladium imminens, ipsa suum minime discrimen attendens, plus alii quam sibi timens, gladium excipit. Post:

Proinde qui morte propria dominos suos a morte redimunt, recte quidem hoc faciunt, si potius salutem animæ suæ quam liberationem alienæ corporis in causa constituent: cum enim eis conscientia dicet, quod fidem dominis suis debeant exhibere, videtur etiam consonum rationi, quod suæ vitæ corporali vitam dominorum debeant anteferre. Deinde rursus: Dilectione itaque, et maxime pro salute

only, is false, and rejected by the soundest philosophers; for we have a natural tendency to friendship. And that I should prefer to my sole good the good of many, benevolence often counsels, sometimes commands. So Seneca and Ambrose. [See.]

X. 1 If any one be in danger of receiving a buffet, or the like evil, some hold that he has a right to protect himself by killing his enemy. If merely corrective justice be regarded, I do not dissent. For though a buffet and death are very unequal, yet he who is about to do me an injury, thereby gives me a Right, that is a moral claim against him, in *infinitum*, so far as I cannot otherwise repel the evil. And even benevolence *per se* does not appear to bind us to the advantage of him who does us wrong. But the Gospel law has made every such act unlawful: for Christ commands us to take a buffet, rather than hurt our adversary; how much less may we kill him? We must

sus se in infinitum, quatenus aliter malum illud a me arcere nequeo. Caritas quoque per se non videtur nos hic obstringere in gratiam nocentis. At lex evangelica omnino tale factum illicitum reddidit: jubet enim Christus alapam accipi potius quam adversario noceatur; quanto magis occidi eum vetat alapæ effugiendæ causa? Quo exemplo monemur cavere a dicto Covarruvias, non pati humanam cognitionem, juris naturalis non ignaram, quicquam naturali ratione permitti, quod apud Deum, qui ipsamet natura est, non sit idem permissum. Nam Deus, qui ita auctor est naturæ, ut et supra naturam agat libere, jus habet nobis leges præscribendi etiam de his rebus, quæ natura sua liberæ indefinitæque sunt: multoque magis ut debeatur id quod natura honestum est, etsi non debitum.

Dict. § 1. p. 3.
in Clem. si
Furiosus.

2 Mirum autem est, cum Dei voluntas in Evangelio tam diserte appareat, inveniri Theologos, et Christianos Theologos, qui non modo cædem recte putent admitti, ut alapa vitetur, sed et accepta alapa, si qui eam impexit fugiat, ad honorem ut aiunt recuperandum: quod mihi a ratione et pietate valde

Navarr. 15.4.
Henr. de Ir-
regul. 11.
Vict. de Jure
Bell. n. 5.

multorum, potest quis salubriter morti suum corpus exponere.

• *Facultatem quandam moralem*] Apollodorus Lib. II. de Lino agens: ἀφικόμενος δὲ εἰς Θήβας καὶ Θηβαῖος γυνόμενος, ὑπὸ 'Ηρακλῆος τῇ κιθάρᾳ πληγῇ ἀπέθανεν. ἐπιπλήξαντα γὰρ αὐτὸν ὀργισθεὶς ἀπέκτεινε· δίκην δὲ ἐπαγόντων τινῶν αὐτῷ φόνου, παρανέγνα νόμον 'Ραδαμάνθου, ὃς ἂν ἀμύνη-

ται τῶν χειρῶν δότικον ᾤξαντι, δθῶον εἶναι. Ad Thebas cum venisset, civis-que Thebanus factus esset, ibi interit ab Hercule percussus cithara: nam cum Linus ferisset Herculem, iratus Hercules mortem ei intulit, reusque a nonnullis factus patratæ cædis, legit in judicio legem Rhadamanti, qua insons pronuntiat, si quis nocuerit ei, qui vim prior intulerit. (Cap. iv. § 9).

therefore beware of the doctrine of Covarruvias, that with Natural Law in our minds, we cannot conceive anything permitted by natural reason which is not permitted by God, since God is Nature itself. For God, who is the author of nature in such a way that he is above Nature, has a right to prescribe laws to us concerning the things which by nature are free and undetermined; much more, that that be duty which by nature is good, though not duty.

2 It is wonderful, since the will of God appears so clearly in the Gospel, that there should be found Theologians, and Christian Theologians, who not only think killing may be permitted to avoid a buffet, but even when a buffet has been received, if the striker flies, for the recovery of honour, as it is called. This seems to me very far removed from reason and piety. For honour is an opinion of one's own excellence; and he who bears such an injury shews himself excellently patient, and

alienum videtur. Nam honor est opinio de excellentia: at qui talem fert injuriam, is patientem se excellenter ostendit: atque ideo honorem auget magis, quam minuit: nec refert, si quidam corrupto judicio virtutem hanc in probrum confectis nominibus traducant: perversa enim illa judicia nec rem nec rei æstimationem immutant. Nec Christiani veteres hoc tantum viderunt, sed et philosophi, qui dixerunt pusilli esse animi contumeliam ferre non posse, ut alibi ostendimus.

3 Hinc etiam liquet, quam non probandum sit, quod a plerisque est traditum, defensionem cum interfectione esse licitam, jure scilicet divino (nam de solo naturæ jure, quo minus ita sit, non disputo) etiam si quis fugere sine periculo possit, quia fuga scilicet ignominiosa sit, in nobili præsertim homine. Atqui nulla hic ignominia est, sed falsa quædam ignominie opinio, spernenda ab omnibus iis, qui virtutem et sapientiam sectantur: qua in re gaudeo me assentientem habere inter Jurisconsultos Carolum Molinæum. Quod de alapa et fuga dixi, idem dictum volo de aliis rebus, per quas vera existimatio non læditur. Quid si vero dicat aliquis de nobis, quod creditum apud bonos existimationem nostram delibaret? Hunc quoque occidi posse sunt qui doceant: mendose admodum, et contra naturæ quoque jus: nam interfectio ista non est modus aptus ad tuendam existimationem.

Soto, Art. 8.
d. g. 5. Dd.
in Lib. ut
vim. D. de
Just. et Jure
et in l. i. c.
unde vi.
Vasquez D.
c. 18. n. 13, 14.
Sylv. in Verb.
Bell. p. 2. n. 4.

In addit. ad
Alex. cons.
119.

Petr. Navar.
li. 3. n. 376.

° Vide supra, Lib. i. cap. iii. § 2.
num. 2. J. B.

† Et inde sumta lex XII. Tabularum]
Addi potest lex Wisigothorum libro vii.

so increases his honour rather than diminishes. Nor does it make any difference if some of corrupt judgment turn this virtue into a disgrace by artificial names: for those perverse judgments neither change the fact nor its value. And not only the ancient Christians said this, but also the philosophers, who said it was the part of a little mind not to be able to bear contumely, as we shall shew elsewhere.

3 Hence it appears also that that is wrong which is delivered by most writers, that defense with slaying is lawful, that is by Divine Law, (for I do not dispute that it is by Natural Law,) when flight without danger is possible: namely, because flight is ignominious, especially in a man of noble family. In truth there is, then, no ignominy, but a false opinion of ignominy, to be despised by those who follow virtue and wisdom. In this matter I rejoice that I have with me the opinion, among the Jurists, of Molinæus.

What I have said of a buffet and of flight, is to be understood of other things, by which our true estimation is not damaged.

But if any one say something of us, which if believed, would

XI. Veniamus ad injurias, quibus res nostræ impetuntur. Si expletricem justitiam respicimus, non negabo ad res conservandas raptorem, si ita opus sit, vel interfici posse: nam quæ inter rem et vitam est inæqualitas, ea favore innocentis et raptoris odio compensatur, ut supra diximus: unde sequitur, si id jus solum respiciamus, posse furem cum re fugientem, si aliter res recuperari nequeat, jaculo prosterni. Demosthenes oratione in Aristocratem: εἴτ' οὐ δεινὸν, ὧ γῇ καὶ θεοί, καὶ φανερώς παράνομον, οὐ μόνον παρὰ τὸν γεγραμμένον νόμον, ἀλλὰ καὶ παρὰ τὸν κοινὸν ἀπάντων ἀνθρώπων νόμον, τὸν ἄγοντα καὶ φέροντα βία τὰμὰ ἐν πολέμιου μοίρᾳ, μὴ ἐξεῖναι μοι ἀμύνεσθαι. *Nonne hoc per Deos durum atque injustum est, nec scriptis tantum legibus, sed et communi inter homines legi contrarium, ut non sinar vi uti adversus eum, qui hostiliter res meas rapiat?* Nec obstat caritas per modum præcepti, lege divina humanaque seposita, nisi res sit, quæ minimum valeat, ac proinde contemni mereatur: quam exceptionem recte nonnulli adjiciunt.

XII. 1 Quis sensus sit legis Hebrææ videamus, cum qua congruit et lex Solonis vetus, quam Demosthenes adversus Timocratem commemorat, et inde sumta lex XII. Tabu-

tit. II. cap. xvi. et Capitulare Caroli Magni Lib. v. cap. 191. Lege Langobarda,

qui nocte alienam curtem ingreditur, nisi ligandum se præbeat, occidit.

detract from our reputation among good men, what then? There are who teach that he also may be slain: very wrongly, and even contrary to Natural Law; for such slaying is not a course fitted to protect our reputation.

XI. Let us come to injuries by which our property is attacked.

If we regard corrective justice, I do not deny that in order to preserve our goods, the robber, if need be, may be killed; for the difference that there is between things and life, is compensated by the preference to be given to the innocent, and the condemnation incurred by the robber, as we have said. Whence it follows that if we regard Natural Law alone, the thief flying with his plunder may, if the goods cannot otherwise be recovered, be slain with a missile. So Demosthenes against Aristocrates. [See.] Nor does benevolence oppose this as a command; setting aside human and divine law; except the thing stolen be a trifle which may be contemned; an exception rightly added by some.

XII. 1 Let us look at the sense of the Hebrew Law, (Exod. xii. 2) with which agrees the law of Solon, and of the Twelve Tables,

Soto d. loco:
Malk. Notab.
135. Jaz. et
Gom. Instit.
de Act. in
pr. Covar. d.
§ 1. n. ibi.
Decimo.
Less. dub. xl.
n. 68.
Covar. d. loco.
Aug. citat. in
c. si Perfor-
diens. de
Homicid.
Less. d. cap.
9. dub. xl.
n. 68.

larum; et ¹Platonis scitum nono de legibus. Nam omnes istæ leges in hoc conveniunt, quod furem nocturnum a diurno distinguunt: de ratione legis ambigitur. Quidam id unum putant spectatum, quod noctu discerni nequeat is qui venit, fur sit, an sicarius, et ideo tanquam sicarium posse interfici. Alii discrimen in hoc positum existiment, quod noctu, quia fur ignotus sit, res minus videantur posse recuperari. Mihi legum conditores nec hoc nec illud proprie videntur spectasse; sed hoc voluisse potius, directe rerum causa interfici neminem debere: quod fieret, exempli causa, si fugientem inermem ²telo prosternerem, ut illo interemto rem meam reciperem: sed si ipse in periculum vitæ adducar, tunc mihi licere a me avertere periculum etiam cum periculo vitæ alienæ: nec obstar mihi quod me in id discrimen adduxerim, dum rem meam cupio retinere, aut occupatam extorquere, aut furem capere, nam in his omnibus nihil mihi posse imputari, qui verser in actu licito, nec cuiquam injuriam faciam, cum utar meo jure.

2 Discrimen ergo nocturni et diurni furis in hoc positum est, quod noctu vix sit copia testium adhibendorum: atque

potest. [Lib. i. Tit. xxiv. cap. 1.]

¹ Νύκτωρ φῶρα εἰς οἰκίαν εἰσέλωντα ἐπὶ κλοπῇ χρημάτων ἐὰν ἐλθὼν κτείνει τις, καθαρὸς ἵσται. Pag. 874 B. Tom. II. Ed. H. Steph. J. B.

² Addidi vocem hanc *inermem*, quæ, quamquam in omnibus Editionibus desit, omnino necessaria est, ut series orationis constet, et species ista differat a se-

quente, in qua Fur etiam fugere manifesto supponitur, sed ita ut se telo defenderet. Vel sic tamen non satis firma et coherens est Auctoris nostri ratiocinatio. Vide Notas Gallicas in h. l. Adde PUFENDORFII nostri Caput antea indicatum. J. B.

³ Exceptio illa ideo additur, quod interdum facile cognosci aut capi Fur

and Plato's *Laws*. These laws all agree in distinguishing the nocturnal from the diurnal thief*. Some think that this is because by night we cannot tell whether he is a thief or a murderer, and therefore may kill him as a murderer. Others think it is because by night we have less chance of recovering the property. I think that neither is the true ground; but this; that no one ought to be slain directly for the sake of mere things, which would be done if I were to kill an unarmed flying thief with a missile, and so recover my goods: but if I am myself in danger of life, then I may repel the danger even with danger to the life of another; nor does this cease to hold, however I have come into that danger, whether by trying to retain my property, or to recover it, or to capture the thief; for in all these cases I am acting lawfully according to my right.

* See *Elements of Morality*, 685.

ideo, si occisus fur reperiatur, facilius credatur ei, qui a se vitæ tuendæ causa dicat furem interemtum, repertum scilicet cum aliquo instrumento, quo nocere posset. Id enim lex Hebræa requirit, agens de fure reperto בַּמַּחְתֶּרֶם : quod quidam transferunt in *perfossione*; alii forte melius, *cum perfossorio instrumento*: quomodo et Jeremiæ ii. 34 ea vox a doctissimis Hebræorum exponitur. Ducit nos ad hanc interpretationem lex duodecim tabularum, quæ furem diurnum occidi vetat, ³addita exceptione, nisi se telo defenderit. Adversus nocturnum igitur præsumtio est defendisse se telo. Teli autem nomine ferrum, fustis et lapis venit, ut ad hanc ipsam legem notatum a Caio est. Contra ab Ulpiano proditum est, quod de fure nocturno dicitur, si quis eum occiderit, impune id ferre, id intelligendum ita demum locum habere, ⁴si parcere ei sine periculo suo non potuit, nimirum rem servando.

L. Si pig-
nore, 64.
§ furem. 2.
D. de Furtis.
L. furem. 9.
D. ad Leg.
Corn. de
Sicariis.

3 Est ergo, ut dixi, præsumtio pro eo, qui furem noctu occidit: sed si forte testes adfuerint, ex quibus constet non fuisse eum, qui furem occidit, adductum in vitæ suæ periculum, jam præsumtio ista cessabit, ac proinde is qui occidit

possit, adeo ut raro quis ad recuperandas res ablatas cogatur adversus Furem fugientem, et armis prædam tueri volentem, suam ipsius vitam defendere. J. B.

⁴ In lege illa, non suo loco ab Architectis Juris Romani posita, agitur de Lege Aquilia, quæ jubebat reparationem damni dati ab eo, qui servum alienum in furto deprehensum interfecerat; non autem de Lege Cornelia,

secundum quam, ut et legibus XII. Tabularum, nocturnum furem omnimodo occidere licebat. Hoc egregie probavit summus Jurisconsultus Clariss. NoODT, *Probab. Jur. Lib. i. cap. ix. et Ad Legem Aquil.* cap. v. quamquam rationes ejus convellere nuper conatus est Vir Eruditissimus, J. van de Water, *Obs. Jur. Rom. Lib. i. cap. 18.* J. B.

2 The difference depends then on this; that by night there is no testimony to be had; and therefore if the thief be found slain, credit is to be given to him who says that he slew him in defending his life: that is, if he be found with any hurtful instrument. Deut. xxii. 2: *If a thief be found breaking up*, should be translated, *with a weapon for breaking through*. So Jer. ii. 34.

So the law of the Twelve Tables forbids the diurnal thief to be killed, except he defended himself with a weapon. On the other hand, Ulpian teaches that a man who kills a nocturnal thief does it with impunity, if he could not without peril avoid it.

3 And therefore, as I have said, the presumption is in favour of him who kills the nocturnal thief; but if there be testimony by which it appears that the slayer was not in danger of his life, the presump-

*L. Itaque 4.
D. ad L. g.
Aquiliam,
§ 1.*

p. 236.

*Deut. xxii.
23, et seqq.*

homicidii tenebitur. Accedit quod tam diu quam noctu lex duodecim tabularum exegit, ut is qui furem deprehendisset, cum clamore id testificaretur, ⁵ut ex Caio discimus, nimirum ut si fieri posset, concursus eo fieret magistratuum aut vicinorum ad auxilium et testimonium. Quia vero concursus talis de die facilius habetur quam de nocte, ut notat Ulpianus ad modo indicatum Demosthenis locum, ideo de nocturno periculo asseveranti magis creditur.

4 Cui simile est quod lex Hebræa ⁶puellæ de vi illata in agro vult credi, in urbe non item, quia clamore concursum ciere potuit ac debuit. Ad superiora et hoc accedit, quod etiamsi cetera essent paria, tamen quæ nocte accidunt, minus explorari, et qualia quantaque sint cognosci possunt: eoque sunt terribiliora. Lex ergo tam Hebræa quam Romana, id quod caritas suadet, civibus suis præcepit, ne quem interficiant ideo duntaxat quia rem furatur, sed ut id ita demum liceat si is qui rem suam servare voluit ipse in discrimen venerit. Moses Maimonides notavit, permissam privato homini alterius interfectionem non aliter, nisi ut servetur id, quod est irreparabile, ut vita et pudicitia.

XIII. 1 Quid vero jam de lege Evangelica dicemus? idem ab ea permitti, quod permisit lex Moysis; an ut in aliis

⁵ Sed clamor ille non exigitur a Duodecim Tabb. Additamentum est Gaii Jcti, qui etiam agit tantum de Lege Aquilia. Vide omnino landati Cl.

Noodtii *Observ.* Lib. i. c. 15. *J. B.*

⁶ *Puellæ de vi in agro illata vult credi*] Bene id explicat Philo, ut locus frequentioris exempli causa sit positus,

tion ceases, and he is guilty of homicide. Add to this, that the law of the Twelve Tables required him who discovered a thief, either diurnal or nocturnal, to cry out aloud; namely, that neighbours or magistrates might come together for help and testimony. And as such concourse is easier by day than by night, therefore more credence is given in the case of the nocturnal danger.

The case is similar with regard to the Hebrew law, Deut. xxii. 23, which directs that a maid who has been forced in the field is to be believed, but in the city, not, *because she cried not being in the city.*

4 To this is to be added, that in what happens by night, we have no means of knowing the extent of the danger, therefore it is more terrible.

And therefore the Hebrew, like the Roman law, directs that which benevolence recommends, that no one should be slain only because he takes a thing, but only if he who defends it comes into danger. Maimonides says, that the slaying of a man is permitted to a private

rebus perfectior est lege Moysis, ita hic quoque plus eam a nobis exigere? Ego quin plus exigit, non dubito. Nam si tunicam et pallium deseri jubet Christus, et Paulus damnum aliquod injustum tolerari potius quam litigari, quæ incruenta contentio est: quanto magis vult res etiam momenti majoris deseri potius, quam interfici a nobis hominem, Dei effigiem, eodem nobiscum sanguine ortum? Quare si res servari potest, ita ut non videatur periculum esse faciendæ cædis, recte id quidem; sin aliter, omittenda res est: nisi forte talis aliqua res sit, ex qua vita nostra et familiæ nostræ pendeat, quæque judicio recuperari nequeat, forte quia fur sit ignotus, et spes sit aliqua sine cæde rem abituram.

2 Et quanquam hodie omnes ferme, tam Jurisconsulti, quam Theologi, doceant, recte hominem a nobis interfici posse rerum defendendarum causa, etiam extra eos fines, in quibus lex Moysis et Romana id permittit; puta si fur jam re accepta fugiat; tamen quin ea quam protulimus sententia veterum Christianorum fuerit, non dubitamus: nec dubitavit Augustinus, cujus hæc verba sunt: *Quomodo apud divinam providentiam a peccato liberi sunt, qui pro his rebus, quas contemni oportet, humana cæde polluti sunt?* Nimirum in hac materia, ut in aliis multis, cum tempore laxata est dis-

*Soto d. Art. 8.
Leas. dub. xi.
n. 74.
Sylv. in Verb.
Bell. 2. n. 3.
Par. c. 9. de
Homicid.
Leas. d. loco.*

*Lib. 1. de Lib.
Arbitr. 5.*

non quod ex eo solo semper definienda sit controversia. Potest enim, ut libro de specialibus legibus ille disserit, et in urbe aliqua vim pati ocluso ore, et in

agro aliqua consentire in stuprum, (Pag. 788 D, E. *Ed. Paris.*)

* *Laxata est disciplina*] Hieronymus in vita Malchi: *Postquam ecclesia*

person only to preserve what, lost, cannot be recovered, life and chastity.

XIII. 1 What shall we say of the Gospel law? That it permits what the Mosaic law permitted; or that in this, as in other cases, the Gospel is more perfect than the Law, and requires more of us? I do not doubt that it does require more; for if Christ direct us to give up our coat and cloak, and Paul, to suffer unjust loss, rather than have recourse to the bloodless contest of law; they would have directed us to give up things of greater value, rather than put to death a man, the image of God, and sprung of the same blood with ourselves. Wherefore if our property can be preserved without peril of slaying, it is well; but if not, it is to be given up: except it be something on which our life and that of our family depends, and which cannot be recovered at law: as for instance, if the thief be unknown, and we have some hope that the matter will end without fatal consequences.

2 And though almost all, both Jurists and Theologians, hold that we may not only kill a man in defense of our property, but beyond

ciplina, et paulatim interpretatio legis Evangelicæ cœpit ad sæculi mores accommodari. Olim in clericis retineri solebat forma veteris instituti: tandem his quoque remissa est hoc nomine censura.

XIV. Quæritur a nonnullis, an non lex saltem civilis, ut jus habens vitæ ac necis, si quo casu permittat furem interfici a privato, simul etiam præstet, ut id ab omni culpa sit liberum. Minime vero id concedendum arbitror. Nam primum lex jus necis non habet in omnes cives ex quovis delicto, sed demum ex delicto tam gravi, ut mortem mereatur. Est autem valde probabilis Scoti sententia, fas non esse quemquam ad mortem damnare, nisi ob delicta, quæ lex per Mosem data morte punivit, addito duntaxat, aut quæ his sunt paria recta æstimatione. Neque enim videtur notitia divinæ voluntatis, quæ sola animum tranquillat, aliunde in hoc negotio tam gravi haberi posse, quam ex illa lege, quæ certe mortis pœnam in furem non constituit. Præterea vero lex nec debet, nec solet jus dare, etiam eos, qui mortem meru-

cœpit habere Christianos magistratus, facta est quidem opibus major, sed virtutibus minor. (Tom. I. pag. 255 B. ubi tamen paullo aliter verba leguntur). Vide c. *suscipimus*, de homicidio voluntario (in *Decretalibus*) et c. de his, 36. distinct. 50.

¶ *Nisi ob delicta, quæ lex per Mosem data morte punivit*] Contra leges, quæ venantes rusticos morte puniunt, vide

Gregorium Turonensem libro x. c. 10. Johannem Sarisberiensem *Policratici* Lib. I. cap. IV. (pag. 18. *Ed. Lugd. Bat.* 1639). Petrum Blesensem epistola CXXIX.

¶ *Ita ut ad bellum publicum quoque aptari debeant*] Ammianus Lib. XXIII. (Cap. I.) *Cum irruentibus armis externis lex una sit et perpetua, salutem omni ratione defendere, nihil renitente vi moris.*

that limit; as, if he be running off with what he has taken; yet we have no doubt that the opinion which we have stated was that of the early Christians. So Augustine. But this discipline has been relaxed by time.

XIV. It is made a question whether the civil law, when it permits us to kill a thief with impunity, does not give us a Right to do so; since the civil law has the Right of life and death. But this is not so. In the first place, the Civil Law has not the Right of life and death in all cases, but only in cases of great crimes. The opinion of Scotus is probable, that we have no right to condemn any one to death except for the crimes so visited in the Mosaic Law, or those which are of the same atrocity. In fact, in so grave a case, we cannot have a knowledge of the divine will which can satisfy our minds, except from that law; which certainly does not punish theft with death. And moreover, the law neither does nor ought to give the Right of privately

erunt, privatim interficiendi, nisi in criminibus valde atrocibus: alioqui frustra instituta esset iudiciorum auctoritas. Quare si quando lex impune furem dicit interfici, tollere quidem poenam censenda est, sed non etiam jus dare.

XV. Ex his quæ diximus apparet, duobus modis posse contingere, ut a privatis sine peccato suscipiatur singularis dimicatio: primum, si invasor concedat alteri licentiam dimicandi, alioqui eum occisurus sine dimicatione: deinde, si rex aut magistratus duos mortem meritos inter se committat; quod si fiat, illis quidem licebit arripere spem salutis. At qui id iussit, is minus recte officio functus videbitur, cum satius fuisset, si unius supplicium sufficere videbatur, sorte eligi moriturum.

XVI. Quæ vero dicta a nobis huc usque sunt, de iure tuendi se ac sua, maxime quidem ad bellum privatum pertinent, sed ita ut ad publicum quoque aptari debeant, habita diversitatis ratione. Nam in privato bello jus quasi momentaneum est, et cessat simulatque iudicem adiri res patitur.

[De ultimis verbis, ubi in Editione VALESII et GRONOVII legitur, *remittente, pro remittente*, vide JAC. GUTHOFRED. in *Cod. Theod. T. V. pag. ult. J. B.*] Alexander Imperator oratione ad milites apud Herodianum VI: καὶ τὸ μὲν ἀρχαῖον ἀδίκων ἔργων οὐκ εὐγνώμονα ἔχει τὴν πρόκλησιν· τὸ δὲ τοῦς ὀχλοῦντας ἀποσείσθαι, ἕκ τε τῆς ἀγαθῆς

συνειδήσεως ἔχει τὸ θαρράλεον, καὶ ἐκ τοῦ μὴ ἀδικεῖν ἀλλ' ἀμύνεσθαι, ὑπάρχει τὸ εὐελπεῖ. *Injurias qui prior infert, nihil habet probabilis coloris: at qui sibi molestos arcet, ex bona conscientia sumit fiduciam, bonaque ei spes adest inde, quod injuriam non inferat, sed auferat.* (Cap. 3, num. 8, 9. *Ed. Bæcler.*)

putting to death those who deserve death, except in very atrocious crimes; otherwise tribunals would be useless. Wherefore if the law allows us in any case to kill a thief with impunity, it takes away the punishment, but does not give the Right.

XV. It follows, from what has been said, that private persons may join in single combat in two cases; first, if an assailant gives us the choice of single combat, being ready to kill us otherwise without combat; and secondly, if the king or magistrate set two condemned persons to fight in such a combat; in which case they may take their chance of surviving. But he who gives such command does not seem to do his duty well; for if the death of one was enough, it was better that he who should die should be chosen by lot.

XVI. What has been said of the right of defending ourselves and our property, more peculiarly relates to private war, but so that it may be adapted to public war, attending to the diversity of conditions. For in private war the Right is momentary, and ceases as soon as the

At publicum, quia non oritur, nisi ubi non sunt aut cessant judicia, tractum habet, et perpetuo fovetur accedentibus novis damnis et injuriis. Præterea in bello privato ferme defensio mera consideratur: at publicæ potestates cum defensione et ulciscendi habent jus. Unde illis licet prævenire vim non præsentem, sed quæ de longo imminere videatur, non directe (id enim injustum esse supra docuimus) sed indirecte ulciscendo delictum cœptum jam, sed non consummatum: de quo agendi erit alibi locus.

XVII. Illud vero minime ferendum est, quod quidam tradiderunt, jure gentium arma recte sumi ad imminuendam potentiam crescentem, quæ nimium aucta nocere posset. Fateor in consultationem de bello et hoc venire, non sub ratione justæ, sed sub ratione utilis: ut si ex alia causa justum sit bellum, ex hac causa prudenter quoque susceptum judicetur: nec aliud dicunt, qui in hanc rem citantur auctores. Sed ut vim pati posse ad vim inferendam jus tribuat, ab omni æquitatis ratione abhorret. Ita vita humana est, ut plena securitas nunquam nobis constet. Adversus incertos metus a divina providentia et ab innoxia cautione, non a vi præsidium petendum est.

Alb. Gent. l.
14.

Bald. l. lib. de
Rer. Divis.

Alb. Gent. l.
13.
Castr. v. de
Justitia.

XVIII. 1 Nec minus illud displicet, quod docent, jus-

* Immo Lacedæmonii Thebanis. Deinde non agit heic Aristides de oblata

æqua satisfactione: verum de vindicta, quam Thebani ipsi sumserant, in præ-

judge can be referred to. But public war does not arise, except when the judge's authority does not exist, or ends, has a prolonged character, and is constantly sustained by the accession of new losses and injuries. Besides in private war, defense alone is considered; but the public powers have the right not only of defending, but also of obtaining satisfaction. Hence they may prevent force not present, and threatening from afar; not directly (for that, as we have taught, is unjust,) but indirectly, by taking satisfaction for a delinquency begun, but not consummated*: of which we shall treat elsewhere.

XVII. There is an intolerable doctrine in some writers, that by the Law of Nations we may rightly take arms against a power which is increasing, and may increase, so as to be dangerous. Undoubtedly, in deliberating of war, this may come into consideration, not as a matter of justice, but as a matter of utility; so that if the war be just on

* The broad differences marked in this article between public war and private self-defense shew how improperly the latter is called war. W. W.

tam esse defensionem etiam eorum, qui bellum promeriti sunt, quia scilicet pauci contenti sunt tantundem reponere vindictæ, quantum acceperunt injuriæ. Nam metus ille rei incertæ jus ad vim dare non potest: unde nec reus criminis jus habet publicis ministris capere se volentibus per vim resistendi, ob metum ne plus æquo puniatur.

2 Sed qui in alium peccavit, debet primum ei quem læsit offerre satisfactionem viri boni arbitrato: ac tum demum pia erunt ejus arma. Sic Ezechias, cum fœdere non stetisset, ^{2 Reg. xviii. 7, 14. et xlix.} quod cum rege Assyrio majores ejus pepigerant, bello petitus fatetur culpam, et regi permittit arbitrium mulctæ: idque cum fecisset, et postea iterum bello lacesseretur, fretus bona conscientia vim hostium sustinuit, et Deum habuit faventem. Pontius Samnis post res Romanis redditas, deditum belli auctorem, *Expiatum*, inquit, *est, quicquid ex federe rupto irarum in nos coelestium fuit.* ^{Liv. ix. 1.} *Satis scio, quibuscunque Diis cordi fuit subigi nos ad necessitatem dedendi res, iis non fuisse cordi tam superbe a Romanis federis expiationem speretam.* Mox: *Quid ultra tibi, Romane, quid federi, quid Diis arbitriis federis debeo? Quem tibi tuarum irarum, quem meorum suppliciorum judicem feram? Neminem, neque populum, neque privatum fugio.* Sic cum Thebani omnia æqua obtulissent ⁶ Lacedæmoniiis, ii autem ultra

lio Leuctrico, ubi victores fuerant. Vide Græc. Lib. vi. cap. v. § 33. et seqq. locum, pag. 93. Tom. II. Ed. Paul. J. B. Steph. et adde Xenophontem, *Hist.*

other accounts, it may, on this account, be prudent; and this is what the arguments of authors come to. But that the possibility of suffering force gives us the right of using force, is contrary to all notion of equity. Such is human life, that we are never in complete security. We must seek protection against uncertain fears from Divine Providence, and from blameless caution, not from force.

XVIII. 1 Nor do we agree that those who have deserved war, have a Right to defend themselves; namely, because few persons are content with taking satisfaction to the mere extent of the injury. For that fear of an uncertainty cannot give a Right to force: and so, a person accused of a crime has not a right of forcibly resisting the ministers of justice, for fear of being over-punished.

2 He who has injured another ought first to offer him satisfaction at the arbitration of a good man; and if this fail, his warfare will be

tenderent, ⁷bonam causam ab his ad illos transiisse ait Aristides Leuctrica prima.

⁷ *Bonam causam ab his ad illos transiisse*] De principe Chalepi, qui pacem et residua tributorum obtulerat Romano Argyropolo Imperatori, vide Zonaram (Lib. xvii. cap. xi.) simile de Cruciferis in Cromero libro xvii. (pag. 393. *Ed. Basil. 1555*) de Helvetiis, qui Carolo Burgundo de curru ovium pelibus onusto, ademptoque mercatoribus, satisfactionem obtulerant, vide Philip-

pum Cominseum libro vii. [Non ipsi Helvetii currum mercatoribus ademerrunt, sed currum, qui Helvetii cujusdam mercatoris erat, Comes Romondius prehendi jussit: unde ortum bellum Helvetiorum cum eo, et postea, cum Carolo Audace, hoc obtentu adversus illos arma movente. Vide pag. 66. et 67. Versionis Sleidan!, qua usus Auctor noster. *Ed. Wech. J. B.*]

righteous. So Hezekiah acted, 2 Kings xviii. 7, 14, and xix. 1. So Pontius the Samnite urged that this was all that could be required. [See Livy.] So when the Thebans had done this, Aristides says that justice had passed over to their side.

CAPUT II.

DE HIS, QUÆ HOMINIBUS COMMUNITER COMPETUNT.

- | | |
|--|--|
| <p>I. <i>Ejus quod nostrum est divisio.</i></p> <p>II. <i>Proprietatis exordium et progressus.</i></p> <p>III. <i>Quædam propria fieri non posse, ut mare sumtum pro suo integro aut præcipuis partibus, et quare.</i></p> <p>IV. <i>Sola non occupata cedere singulis occupantibus, nisi per universitatem a populo occupata sint.</i></p> <p>V. <i>Feras, pisces, aves cedere occupanti, nisi lex obstet.</i></p> <p>VI. <i>In res proprias factas jus hominibus competere eis utendi in tempore necessitatis et unde id veniat.</i></p> <p>VII. <i>Obtinere id, nisi necessitas aliter sit vitabilis.</i></p> <p>VIII. <i>Nisi par sit necessitas in possidentia.</i></p> <p>IX. <i>Adjunctum esse onus restituendi rem, cum restitui poterit.</i></p> <p>X. <i>Exemplum hujus juris in bellis.</i></p> <p>XI. <i>In res proprias factas jus hominibus competere ad utilitatem, qua nihil alteri dedit.</i></p> | <p>XII. <i>Hinc jus in aquam profusentem.</i></p> <p>XIII. <i>Jus transeundi terra et amnibus, quod explicatur.</i></p> <p>XIV. <i>An mercibus transeuntibus vectigal possit imponi.</i></p> <p>XV. <i>Jus morandi ad tempus.</i></p> <p>XVI. <i>Jus habitandi his competens, qui sedibus suis expulsi sunt, sub imperio quod reperitur.</i></p> <p>XVII. <i>Jus habendi loca deserta: quod quomodo intelligendum.</i></p> <p>XVIII. <i>Jus ad actus, quos vita humana desiderat.</i></p> <p>XIX. <i>Ut ad emenda necessaria.</i></p> <p>XX. <i>Non etiam ad res suas vendendas.</i></p> <p>XXI. <i>Ad quærenda matrimonia: quod explicatur.</i></p> <p>XXII. <i>Jus ea faciendi, quæ promiscue extraneis permittuntur.</i></p> <p>XXIII. <i>Quod intelligendum, si quid permittatur quasi ex jure naturali, non ut ex beneficio.</i></p> <p>XXIV. <i>An licitus sit contractus cum populo, ut is fruges suas, eis, quibuscum jam contraxit, non aliis vendat.</i></p> |
|--|--|

I. **S**EQUITUR inter belli causas injuria facta, et primum adversus id, quod nostrum est. Est autem nostrum aliud communi hominum jure, aliud nostro singulari. Ab eo, quod hominibus commune est, incipiamus. Hoc jus aut

CHAPTER II. *Of the Common Rights of Mankind.*

I. We treat now of the Causes of War; and first, of Injury done us with respect to what is ours. Some things are *ours* by the Common Right of mankind; others by our own Special Right. We will begin

directe est in rem corporalem, aut ad actus aliquos. Res corporales aut vacuæ sunt a proprietate, aut jam aliquorum propriæ. Res, quæ a proprietate vacant, aut tales sunt, ut propriæ fieri nequeant, aut ut possint. Quo rectius hoc intelligatur, noscendum est proprietatis, ¹quod dominium jurisconsulti vocant, exordium.

Gen. I. 29, 30.
ix. 2.

Lib. xliii. 1.

Cap. 30.

II. 1 Deus humano generi generaliter contulit jus in res hujus inferioris naturæ statim a mundo condito, atque iterum mundo post diluvium reparato. ^a*Erant*, ut Justinus loquitur, *omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset*. Hinc factum ut statim quisque hominum ad suos usus arripere posset, quod vellet, et quæ consumi poterant consumere. Ac talis usus universalis juris erat tum vice proprietatis. Nam quod quisque sic arripuerat, id ei eripere alter nisi per injuriam non poterat. Similitudine hoc intelligi potest ea, quæ est apud Ciceronem *de Finibus* iii.

¹ De tota hac materia consule PUFENDORFIUM, *De Jure Nat. ac Gent.* Lib. iv. cap. 4. cum Notis nostris, præsertim Editionis alterius, ubi res longe plenius et accuratius pertractatur. J. B.

^a *Erant omnia communia et indivisa omnibus*] Ejus vestigium mansit in Saturnalibus.

^b *Theatrum cum commune sit*] Seneca de Beneficiis vii. c. xii. *Equestria omnium equitum Romanorum sunt: in illis tamen locus meus fit proprius, quem occupavi.*

^c *Ex simplicitate eximia*] Horatius:

Campestres melius Scythiæ,
Quorum planstra vagæ rite trahunt domos,
Vivunt, et rigidi Gætæ,
Immetata quibus jugera liberas
Fruges et Cereæ ferunt,
Nec cultura placet longior annus,
Defunctumque laboribus
Æquali recreat sorte vicarius.
(Lib. iii. Od. xxiv. 9).

^d *Esseni*] Et ab his orti Pythagoristæ. Vide Porphyrium, (*vit. Pythag.* § 20). Diogenem Laërtium, (viii. 10). Gellium, i. 9. [Vide Auctoris *Epist.* 1. part. 652. ubi hanc suam conjecturam rationibus firmare nititur. Quod quidem, sive verum, sive falsum, parum ad

with the Common Right of mankind. This Right either directly regards corporal things, or certain acts. Corporal things are either unappropriated, or the property of some one. Unappropriated things are either such as cannot be appropriated, or such as can. Hence we must consider the origin of Property, or Ownership, which the jurists call *Dominium*.

II. 1 God gave the human race generally a right to the things of a lower nature, at the Creation, and again, after the Deluge. Every thing was common and undivided, as if all had one patrimony. Hence each man might take for his use what he would, and consume what he could. Such a Universal Use was then a Right, as Property is now. What each one had taken, another could not take from him by force without wrong. Cicero compares this state of things to the theatre, which

^b *Theatrum cum commune sit, recte tamen dici potest, ejus esse eum locum, quem quisque occuparit.*

Neque is status durare non potuit, si aut in magna quadam simplicitate perstitissent homines, aut vixissent inter se in mutua quadam eximia caritate. Horum alterum, communionem scilicet ^cex simplicitate eximia, videre licet in quibusdam Americæ populis, qui per sæcula multa sine incommodo in eo more perstiterunt: alterum vero, communionem nimirum ex caritate, exhibuerunt olim ^dEsseni, deinde Christiani, qui Hierosolymis primi exstiterunt, ac nunc quoque non pauci, qui vitam degunt asceticam. Simplicitatis, in qua ^eprimi homines sunt conditi, argumentum præbuit nuditas. Erat in illis ignoratio magis vitiorum, quam cognitio virtutis: ut de Scythiis loquitur Trogius. *Vetustissimi mortalium*, inquit Justin. ii. 2. Tacitus, *'nulla adhuc mala libidine, sine probro, scelere,* Ann. lib. 28. *eoque sine pœna aut coercitionibus agebant.* Apud Macro-

rem facit. J. B.]

^c *Primi homines*] Adam typus humani generis. Vide Origenem contra Celsum. [Lib. vii. § 28.] Neque nihil huc pertinet, quod Tertullianus dixit libro de Anima: *Naturale enim rationale credendum est, quod animæ a primordio sit ingenitum, a rationali videlicet auctore. Quid enim non rationale, quod Deus jussu quoque ediderit, nedum id quod proprio afflatu suo emisit? Irrationale autem posterius intelligendum est, ut quod acciderit ex serpentis instinctu, ipsum illud transgressionis admissum, atque exinde*

inoleverit, et coadoleverit in anima ad instar jam naturalitatis, quia statim in primordio naturæ accidit. (Cap. 16).

^f *Nulla adhuc mala libidine*] Seneca de iisdem epistola x. *ignorantia rerum innocentes erant.* Deinde locutus de justitia, prudentia, temperantia, fortitudine, addit: *Omnibus his virtutibus habebat similia quædam rudis vita.* Josephus: *μηδεμιᾷ ξενίζόμενοι ψυχὴν φροντίζι.* Nullis curis turbidum habentes animum. (Antiq. Jud. Lib. i. cap. i. § 4. pag. 8. Ed. Hudson. Amst. ubi legitur ξαινόμενοι.)

though it be common, yet when a man has taken any place, it is his.

And this state might have continued, if men had remained in great simplicity, or had lived in great mutual good will. One of these two conditions, a community of goods arising from extreme simplicity, we may see in some of the peoples of America, who have lived for many generations in that state without inconvenience. The other, a community of goods from mutual charity, was exhibited formerly among the Essenes, and then among the first Christians at Jerusalem, and now in many places among Ascetics. The simplicity of the first races of men was proved by their nakedness. They were rather ignorant of vices than acquainted with virtue: as Trogius says of the Scythians. So Tacitus, Macrobius, the Book of Wisdom, St Paul. Their business was the worship of God, of which the Tree of Life was a symbol, (see

2 Ad Somn.
Scip. 10.

Sap. iiii. 24.
2 Cor. xi. 3.

Prov. iiii. 18.
Philo de
Mund. cre.
p. 35 D.
Apocal. xxii.
2.

bium est: *Primum inter homines mali nescia et adhuc astutia inexperta simplicitas*: hæc simplicitas ἁφθαρσία videtur dici sapienti Hebræo, Paulo apostolo ἀπλότης, quam opponit τῇ πανουργίᾳ, vāfræ calliditati. Negotium erat illis unicum DEI cultus, ^hcujus symbolum arbor vitæ, ut Hebræi veteres explicant, assentiente Apocalypsi. Vivebant autem facile ex his, ⁱquæ sine industria sponte sua terra proferebat.

De Mund.
Opif. p. 35 B.
Eccles. vii. 30.

p. 92 A.

2 Verum in vita hac simplice et innocente non perstiterunt homines, sed animum applicuerunt ad artes varias, quarum symbolum erat ^karbor scientiæ boni et mali, id est, earum rerum, quibus tum bene tum male uti licet: φρόνησιν μέσσην vocat Philo. Huc respiciens Salomo, *Deus*, inquit, *creavit hominem rectum*, id est, *simplicem*, *sed ipsi quæsierunt sibi cogitationes multas*; ἔρρεπον εἰς πανουργίαν, ut dicto loco Philo loquitur. Dion Prusæensis oratione vi. ἀλλὰ τὴν πανουργίαν τοῖς ὕστερον καὶ τὸ πολλὰ εὐρίσκειν καὶ μηχανᾶσθαι πρὸς τὸν βίον οὐ πάνν τι συνενεργεῖν. οὐ γὰρ πρὸς ἀνδρείαν, οὐδὲ δικαιοσύνην, χρῆσθαι τῇ σοφίᾳ τοὺς ἀνθρώπους, ἀλλὰ πρὸς ἡδόνην. *His qui primos secuti sunt homi-*

^ε Ἁφθαρσία videtur dici sapienti Hebræo] Sic et Paulus Ephes. vi. 24. qui et δι᾿αφθορίαν dixit Tit. ii. 17. [Auctor in Adnotationibus suis ad V. et N. Test. voces has aliter exponit. Vide, si tanti est. J. B.]

^h Cujus symbolum arbor vitæ] Sanctitas superior Rabbini: ἐνθεος σοφία, divina sapientia, Arethæ ad Apocalypsin. De Paradiso vide Ecclesiastici caput xl. 17. et quatuor fluminibus Paradisi eundem librum xxiv. 25. et sequentibus.

ⁱ Quæ sine industria sponte sua terra proferebat] Vide egregium hac de re locum libro i. (cap. 2) Varronis de *Rustica*, ex Dicæarcho: et confer quæ

ex eodem Dicæarcho habet Porphyrius de *non Eru Animalium* iv. (Pag. 342, et seqq.)

^k Arbor scientiæ boni et mali] Josephus (*Antiq. Jud.* Lib. i. cap. 1. § 4. pag. 7): τὸ φυτόν ἐξ ὑψηλῆς καὶ διανοίας ἐπήρχεν· quæ arbor erat solertiæ et intelligentiæ. Telemachus apud Homerum (*Odysse.* xi. 308):

καὶ οἷα ἱεᾶσθαι,
Εὐθὺς τε καὶ τὰ χεῖρα, πάρος δ' ἐτι νέμεις
ἦα.

omnia novi,
Quæ bona, quæ mala sunt, nec sum jam parvus
ut ante.

Zenoni Cittienai prudentia, scientia bonorum, et malorum, et mediorum. Est

Revelation xxii. 2). They lived easily on what the earth, without labour, spontaneously produced.

2 But men did not continue in this simple and innocent life, but applied their minds to various arts, of which the symbol was the Tree of the Knowledge of good and evil; that is, of those things which may be used ill or well. So Philo, Solomon, Dio Prusæensis. [See.] The oldest arts, agriculture and pasture, appeared in the first brothers (Cain and Abel); not without a division of possessions already shew-

nibus callidatē ¹variaque ad vitam reperta non multum fuisse conducibilia. Ingenio enim usos homines non tam ad fortitudinem ac justitiam quam ad voluptatem. Antiquissimæ artes agricultura et pastura in primis fratribus apparuerunt; non sine aliqua rerum distributione; ex studiorum diversitate æmulatio, etiam cædes: ac tandem cum boni malorum consortio contaminarentur, ^mvitæ genus giganteum, id est, violentum, quale est eorum, quos *χειποδίκας* Græci vocant. ⁿMundo per diluvium purgato, pro ferina illa vita successit cupido voluptatis, ^ocui inserviit vinum; unde et illiciti amores.

3 Præcipue vero concordiam rupit generosius vitium, ambitio, ²cujus signum turris Babylonica: mox alii alias terras Gen. x. 11. partito possederunt. Sed postea quoque inter homines vicinos mansit non pecorum, sed terrarum pascuarum communio: quia tanta erat in exiguo hominum numero latitudo terrarum, Gen. xlii. ut sine incommodo ullo ad multorum usus sufficeret:

Ne signare quidem aut partiri limite campum
Fas erat.

Virg. Georg.
l. v. 126.

Donec, aucto ut hominum ita pecudum numero, passim terræ

id apud Diogenem Laertium (Lib. vii. § 92). Plutarchus de *Communitibus No- titiis*: τὴ δεινὸν, ἐὶ τῶν κακῶν ἀναπει- θέστων οὐκ ἴστας φρόνησι, ἐτέραν δ' ἀντ' ἐκείνης ἀρετὴν ἔχουσαν, οὐκ ἀγα- θῶν καὶ κακῶν, ἀλλ' ἀγαθῶν μόνον ἐπιστήμην οὖσαν; Quid nocet, si ab- latis malis nulla erit prudentia, pro ea autem alienam habeamus virtutem, quæ non bonorum ac malorum, sed solum bonorum sit scientia? (Pag. 1067 A. Tom. II.)

¹ *Variaque ad vitam reperta*] Late hoc explicat Seneca epistola xc. quem lege, et Dicaearchum apud dictos jam scriptores.

^m *Vitæ genus giganteum*] Seneca

Naturalium III. in fine: *extinctis pa- riter feris, in quarum homines ingenia transierant.* (Cap. 30).

ⁿ *Mundo per diluvium purgato, pro ferina illa vita successit cupido voluptatis*] Seneca dicto loco: *illis quoque innocentia non durabit, nisi dum novi sunt.* (Quæst. Not. III. 20).

^o *Cui inserviit vinum, unde et illiciti amores*] *Premiumque summum ebrietatis libido portentosa ac jucundum nefas.* Seneca ibidem. [Hæc verba non sunt Senecæ: verum Plinii, *Hist. Nat. Lib. xiv. c. 22. pag. 723. Tom. I. Edit. Hard.* in fol. J. B.]

² *Ambitione impulsos fuisse homines ad extruendam Turrim Babylonicam,*

ing itself, and even not without bloodshed. And at length when the good were corrupted by intercourse with the bad, came the life of the Giants, that is, times of violence. And when the world was cleared by the Deluge, instead of that ferine life, followed the pursuit of pleasure, with wine and lawless love.

3 But the concord was especially broken by a more generous vice, ambition: of which the Tower of Babel was the sign; and then different men divided the earth among them and possessed it. Yet

Gen. xxi.

Mari libero
lib.

non in gentes ut ante, sed in familias dividi cœperunt. ^pPuteos vero, rem in siticulosa regione valde necessariam, nec multis sufficientem, occupando quisque suos fecere. Hæc sunt, quæ ex sacra historia docemur, satis convenientia cum his, quæ philosophi et poëtæ de primo statu rerum communium et postea secuta rerum distributione dixerunt, quorum testimonia alibi a nobis producta sunt.

4 Hinc discimus, quæ fuerit causa, ob quam a primæva communione rerum primo mobilium, deinde et immobilium discessum est: nimirum quod, cum non contenti homines ^qvesci sponte natis, antra habitare, corpore aut nudo agere, aut corticibus arborum ferarumve pellibus vestito, vitæ genus exquisitius delegissent, industria opus fuit, quam singuli rebus singulis adhiberent; quo minus autem fructus in commune conferrentur, primum obstitit locorum, in quæ homines discesserunt, distantia, deinde justitiæ et amoris defectus, per quem fiebat,

non ita certum est. Quas de re videri possunt Origines Babylonice Eruditissimi PERIZONI, cap. xiii. J. B.

^p Puteos] De puteis ad Oasim inter multos communibus vide Olym-piodorum apud Photium. (Cod. 80. pag. 193. Edit. Rothomag.)

^q Vesci sponte natis, antra habitare, corpore aut nudo agere, aut corticibus arborum ferarumve pellibus vestito] Qualem vitam Scritefannorum nobis accurate describit Procopius Gothicoorum 11. (c. 15.) Adde Plinium XII. Procœm. et Vitruvium II. c. i.

^s Nullum pactum heic intervenisse, neque etiam necessarium fuisse, fuse probavimus in Notis nostris Gallicis ad PUFENDORF. De Jure Nat. et Gent. Lib. IV. cap. IV. § 4, et seqq. J. B.

^r Ut per occupationem] Vide quæ hæc de re ex Gemara et Alcorano nobis protulit honos Britannis Seldenus in Thalassocratico. (Seu Mari Clauso, Lib. I. cap. 4, pag. 24. Ed. Londin. 1636).

^s Censeri debet inter omnes convenisse, ut quod quisque occupasset, id proprium haberet] Cicero: ex quo quia suum cuiusque fuit eorum quæ natura fuit.

still there remained among neighbours a community, not of their flocks and herds, but of their pastures; for there was enough for all for a time: until, cattle increasing, the land was divided, not according to nations as before, but according to families. And some made and occupied their own wells, things most necessary in a thirsty region, and not sufficing for many. This is the account of the sacred history, sufficiently agreeing with the account given by philosophers and poets.

4 There we learn what was the cause why men departed from the community of things, first of moveables, then of immoveables: namely, because when they were not content to feed on spontaneous produce, to dwell in caves, to go naked, or clothed in bark or in skins, but had sought a more exquisite kind of living, there was need of industry, which particular persons might employ on particular things. And as

ut nec in labore, nec in consumptione fructuum, quæ debebat, æqualitas servaretur.

5 Simul discimus, quomodo res in proprietatem iverint: non animi actu solo; neque enim scire alii poterant, quid ali suum esse vellent, ut eo abstinerent; et idem velle plures poterant: sed pacto ³quodam aut expresso, ut per divisionem, aut tacito, ¹ut per occupationem: simulatque enim communio displicuit, nec instituta est divisio, ²censeri debet inter omnes convenisse, ut, quod quisque occupasset, id proprium haberet. *Concessum*, inquit Cicero, *sibi ut quisque malit, quod ad vitæ* Offic. iii. 5.
usum pertinet, quam alteri acquiri, non repugnante natura. Cui addendum illud Quintiliani: *Si hæc conditio est, ut quic-* Ded. xiii.
quid in usum hominis cessit, proprium sit habentis, profecto quidquid jure possidetur, injuria aufertur. Et veteres cum Cererem legiferam, et sacra ejus Thesmophoria dixerunt, hoc Macrob. Sat. iii. 12.
significabant ⁴ex agrorum divisione exstitisse novi cujusdam juris originem.

rant communia, quod cuique obtigit, id quisque teneat. (*De Off.* i. 7). Quod similitudine illustrat. (*Ibid.* Lib. iii. c. 10.) a Chrysippo reperta de stadio, ubi currendo licet vincere adversarium, non eum detrudendo. Scholiastes ad artem poeticam Horatii (Vers. 128. pag. 627. *Edit. Crug.*): *quemadmodum domus aut ager sine domino communis est: occupatus vero jam proprius fit.* Varro in *Age Modo*: *Terra culturæ causa attributa olim particulatim, ut Etruria Tusculis, Samnium Sabellis.* [Apud PHYLLAGRYRIUM in *Virg. Georgic.* II. 167].

¹ *Concessum, sibi ut quisque malit, quod ad vitæ usum pertinet, quam alteri acquiri, non repugnante natura]* Solon: *Χρήματα δ' ἑμαίρεται μὲν ἔχειν, ἀδικίᾳ δὲ κερδαίνειται.*
Οὐκ ἐθέλω.

Divitias habuisse velim, sed non bene partas Non cupiam.

(Vers. 7, 8. *Eleg.*) Cicero *Officiorum* I: *Nec vero rei amplificatio nemini nocens vituperanda est, sed fugienda semper injuria.* (Cap. 8).

² *Ex agrorum divisione exstitisse novi cujusdam juris originem]* *Postquam ex*

to the common use of the fruits of the earth, it was prevented by the dispersion of men into different localities, and by the want of justice and kindness which interfered with a fair division of labour and sustenance.

5 And thus we learn how things became Property; not by an act of the mind alone: for one party could not know what another party wished to have for its own, so as to abstain from that; and several parties might wish for the same thing; but by a certain pact, either express, as by division, or tacit, as by occupation: for as soon as community was given up, and while division was not instituted, it must be supposed to have been a matter of agreement among all, that what each had occupied he should have as his own. So Cicero, Quintilian. And the ancients when they called Ceres the *Author of Laws*, and her

III. 1 His positis dicimus, mare sumtum aut sub ratione integri, aut sub ratione præcipuarum partium, in proprium jus abire non posse: quod, quia de privatis quidam concedunt, non de populis, probamus ex morali primum ratione: quia causa, ob quam a communione discessum est, hic cessat. Est enim tanta maris magnitudo, ut ad ⁴quemvis usum omnibus populis sufficiat, ad aquam hauriendam, ad piscatum, ad navigationem. Idem dicendum esset de aëre, si quis ejus usus esse posset, ad quem terræ usus non esset necessarius, ut est ⁵ad aucupia; unde illa legem accipiunt ab eo, qui in terra imperium habet.

2 Nec aliud censendum de Syrtibus, ubi nihil est quod cultum ferat, et usus unicus petendarum inde arenarum exhauriri nequit. Est et naturalis ratio, ⁶quæ mare consideratum, ut diximus, proprium fieri vetat: quia occupatio non procedit ⁷nisi in re terminata: unde Thucydides terram vacuum vocat *ἀόριστον* et Isocrates terram ab Atheniensibus occupatam *τὴν ὑφ' ἡμῶν ἀφορισθεῖσαν*. Liquida vero quia per se non terminantur (*τὸ ὑγρὸν ἀόριστον οἰκείῳ ὄρω*, inquit Aristoteles) occupari nequeunt, nisi ut contenta in re alia: quomodo lacus et stagna occupata sunt, item flumina quia ripis

Lib. I. 130.

Paneg. p. 48 A.

De Gener. II.
2.

agrorum discretionem nata sunt jura. Ita Servius ad illud in quarto *Æneidos*: *Legifera Cereri*. (Vers. 58.)

⁴ Ratio illa per se contrarium potius probat. Vide quæ diximus in PUFENDORF. *De Jur. Nat. et Gent. Lib.*

IV. cap. v. § 3, 4. et *De Offic. Hom. et Civ. Lib. I. cap. XII. § 4.* ultimarum utriusque Versionis Editionum. J. B.

⁵ *Ad aucupia*] Et habitandi jus. Tam soli quam cœli mensura facienda est, ait Pomponius l. *si opus*. 21. § 2 D.

festival *Thesmophoria*, *Law-bearing*, had this meaning; that from the division of land arose a new origin of Rights.

III. 1 This being laid down, we say that the sea, whether taken as a whole, or as to its principal parts, could not become property. And as some concede this with regard to private persons, but not with regard to peoples, we prove it first from a moral reason; namely, that the cause why community was given up, here ceases. For the magnitude of the sea is so great that it is sufficient for all peoples for every use, either of drawing water, fishing, or navigation. The same might be said of the air, if there was any use of it to which the use of the earth is not also necessary, as in bird-catching it is; and therefore this employment is governed by the ownership of the land.

The same is true of sandy bays, where there is nothing which can be cultivated, and the only use, procuring sand, is inexhaustible.

2 There is also a natural reason which prevents the sea from being

tenentur. Mare vero terra non continetur, par terræ aut terra majus, unde terram mari contineri veteres dixere: τὸν ὠκεανὸν δεσμοῦ ἕνεκα τῇ γῇ περιβεβληθῆναι, quæ Apollonii verba apud Philostratum. Sulpicius Apollinaris apud Gellium: *Quid potest dici citra oceanum esse, cum undique oceanus circumscribat omnes terras, et ambiat?* Mox: *Quum vero omnes terras omnifariam et undique versum circumfluat, nihil citra eum est, sed undarum illius ambitu terris omnibus convallatis in medio ejus sunt omnia, quæ intra oras ejus inclusa sunt.* M. Acilius Consul in oratione ad milites, quæ apud Livium: *Oceano, inquit, qui orbem terrarum amplexu finit.* In Senecæ suasoriis dicitur oceanus totius orbis vinculum terrarumque custodia: Lucano unda mundum coercens. Nec fingenda divisio: nam cum primum terræ divisæ sunt, incognitum erat mare sui maxima parte: atque ex eo nullus fingi modus potest, quo gentes adeo dissitæ de divisione convenirent.

Vit. Apoll.
vii. 26.
Lib. xli. 13.

Suas. i.

Phars. v. 619.

3 Ideo, quæ communia omnium fuerunt, et in prima divisione divisa non sunt, ea non jam divisione, sed occupatione transeunt in jus proprium, nec dividuntur nisi postquam propria esse cœperunt.

quod vi aut clam. Adde legem 83. seu penultimam d. *pro socio*.

* Vide contra, præter SELDENUM, in opere jam laudato, Lib. i. cap. 22. Amplissim. BYNCKERSHOEK. *Diss. de Dominio Maris*, cap. ix. J. B.

† *Nisi in re terminata*] Ideo jugera quæ possessorem non habent immetata dixit Horatius. (Lib. iii. Od. xxiv. 12).

* *Terra majus*] Ita de oceano sensit Jarchas apud Philostratum iii. xi. (cap. 37.)

made property; namely, because occupation can only be applied to a thing which is bounded. [Thucydides, Isocrates.] Now fluids are in themselves unbounded, as Aristotle says; and cannot be occupied except as they are contained in something else; as lakes and ponds are occupied, and rivers as far as their banks go. But the sea is not contained by the land, being equal to the land or greater, so that the ancients say the land is bounded by the sea. [Apollonius, Sulpicius Apollinaris, Livy, Seneca, Lucan.] Nor are we to feign a division of the sea: for when the earth was first divided, the sea was for the most part unknown; and therefore we cannot imagine any way in which distant nations could agree as to such division.

3 Therefore those things which were common to all, and were not divided in the first division, now do not become property by division, but by occupation, and are divided only after they have become property.

IV. Veniamus ad ea, quæ propria fieri possunt, sed nondum facta sunt propria. Talia sunt ^aloca multa inculta adhuc, ^binsulæ in mari, feræ, pisces, aves. Sed duo notanda sunt: duplicem esse occupationem, unam per universitatem, alteram per fundos: prior solet fieri per populum, aut eum, qui populo imperat: altera deinde per singulos, magis tamen assignatione quam libera occupatione. Quod si quid universim occupatum in singulos dominos descriptum non est, non ideo vacuum censeri debet: manet enim in dominio primi occupatoris, puta, populi aut regis. Talia esse solent flumina, lacus, stagna, silvæ, montes asperi.

Covarr. c.
Peccat. par.
11. § 8.
Dd. in l.
cunctos po-
pulos. C. de
summ. Trin.
Innoc. et
Panorm. in
c. a nobis i.
de Sent.
Excom. Co-
varr. d. loco.

V. De feris, piscibus, avibus illud notandum est: qui imperium habet in terras et aquas, ^ceius lege impediri posse aliquos, ne feras, pisces, aves capere, et capiendo acquirere eis liceat: atque hac lege teneri etiam externos. Ratio est, quia ad gubernationem populi moraliter necessarium est, ut qui ei vel ad tempus se admiscant, quod fit intrando territorium, ii conformes se reddant ejus populi institutis. Nec obstat, quod

^a Loca inculta adhuc] Vide Bem-
bum *Historia* vi.

^b Insulæ in mari] Ut Echinades,
quas occupando suas fecit Alcmaeon.
Thucyd. ii. in fine. [Non Echinades
occupavit Alcmaeon, sed loca circum

Æniadas urbem sita, τοὺς περὶ Ολί-
δας τόπους, adeoque in continenti;
quamquam nata olim ex Insulis quibus-
dam vicinia. Inspice locum, § 102.
J. B.]

^c Animalia illa, non minus quam

IV. Let us come to those things which may become property, but are not yet so. Such are many places hitherto uncultivated, uninhabited islands, wild beasts, fishes, birds. But here two remarks are to be made: first, that there are two kinds of occupation, in totality, and in particular shares. The former kind is commonly made by the people or the Ruler of the people; the other by individuals, but rather by assignation than by free occupation. And if anything occupied in totality is not assigned to special owners, that is not free of ownership, but belongs to the ownership of the first occupier, say, the people or the king. Such are rivers, lakes, marshes, woods, rocky mountains.

V. Concerning wild beasts, fishes, birds, this also is to be remarked; that he who has the ownership of the land and water, may, on that ground, prevent any one from taking those creatures, and thus acquiring property in them. The reason is, that it is morally necessary to the government of a people that they who mingle with the people even for a time, which is done by entering the territory, must conform to its institutions. Nor is this disproved by what we often

sæpe in jure Romano legimus, jure naturæ, aut gentium, liberum esse talia animalia venari: hoc enim verum est, quamdiu lex civilis nulla intercedit; sicut lex Romana res mutas relinquebat in illo primævo statu, de quibus aliæ gentes aliud constituerunt. Cum autem lex civilis aliud constituit, eam observari debere jus ipsum naturæ dictat. Lex enim civilis quanquam nihil potest præcipere, quod jus naturæ prohibet, aut prohibere, quod præcipit, potest tamen libertatem naturalem circumscribere, et vetare, quod naturaliter licebat, atque etiam ipsum dominium naturaliter acquirendum vi sua antevertere.

VI. 1 Videamus porro, ecquod jus communiter hominibus competat in eas res, quæ jam propriæ aliquorum factæ sunt: quod quæri mirum fortè aliquis putet, cum proprietates videatur absorpsisse jus illud omne, quod ex rerum communi statu nascebatur. Sed non ita est. Spectandum enim est, quæ mens eorum fuerit, qui primi dominia singularia introduserunt: quæ credenda est talis fuisse, ut quam minimum ab

res aliæ, quæcumque in dominio singulorum non sunt, manserunt re vera in dominio populi, aut Regis, aut Senatus; adeo ut nequaquam necessarium sit fingere, acquisitionem domini in ejusmodi

rebus lege anteverti. Vide quæ diximus in PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. iv. cap. vi. § 3, 4. et *De Officio Hom. et Civ.* Lib. i. cap. xii. § 6. ultimarum Editionum. J. B.

read in the Roman Law, that *jure naturæ* or *jure gentium* men are free to pursue animals of chase. For this is true as long as no Civil Law interferes: as the Roman Law left many things in that primeval state which other nations settled otherwise. And when the Civil Law has settled anything otherwise, the Natural Law itself directs that it be obeyed. For though the Civil Law cannot ordain anything which the Natural Law prohibits, nor prohibit what that ordains: yet it may circumscribe natural liberty, and forbid what was lawful by Natural Law; and even interfere to prevent an ownership which might be acquired by Natural Law.

VI. 1 Let us consider whether men have any Common Right to those things which are already made private property. Some may think that this is a strange question, since property seems to have absorbed all the Right which flowed from the common state of things. But this is not so. For we must consider what was the intention of those who introduced private property: which we must suppose to have been, to recede as little as possible from natural equity. For if even written laws are to be construed in that sense as far as possible, much more is mere usage, which is not fettered by written words.

æquitate naturali recesserit. Nam si scriptæ etiam leges in eum censum trahendæ sunt quatenus fieri potest, multo magis mores, qui scriptorum vinculis non tenentur.

2 Hinc primo sequitur, in gravissima necessitate reviviscere ⁷jus illud pristinum rebus utendi, tanquam si communes mansissent: quia in omnibus legibus humanis, ac proinde et in lege dominii, summa illa necessitas videtur excepta.

Lib. II. § 2.
D. de l. Rhod.

Lib. III. § 7.
D. de Incend.
Lib. XXIX.
§ 3. D. ad
Leg. Aquil.

3 Hinc illud, ut in navigatione, si quando defecerint cibaria, quod quisque habet, in commune conferri debeat. Sic et defendendi mei causa vicini ædificium orto incendio dissipare possum: et funes aut retia discindere, in quæ navis mea impulsæ est, ^csi aliter explicari nequit. Quæ omnia lege civili non introducta, sed exposita sunt.

Thom. II. 2:
lxvi. 7.
Covar. cap.
Peccat. p. 2.
§ 1. Soto, v.
q. 3. art. 4.

4 Nam et inter Theologos recepta sententia est, in tali necessitate, si quis quod ad vitam suam necessarium est,umat aliunde, eum furtum non committere: cujus definitionis non hæc causa est, quam nonnulli adferunt, quod rei dominus ex caritatis regula rem egenti dare tenetur, sed quod res omnes in dominos distinctæ, cum benigna quadam receptione primitivi juris videantur. Nam si primi divisores interrogati fuis-

⁷ Confer PUFENDORF. *De Jure Nat. et Gent.* Lib. II. cap. vi. § 5, 6, 7. ubi argumentum istud adcuratius pertrahatur. *J. B.*

^c *Si aliter explicari nequit*] Talia non procedunt nisi ex magna et satis necessaria causa. Ulpianus l. *Si alius*. § 4 d. *quod vi aut clam*: ubi sequitur exemplum illud de ædibus intercis ar-

cendi incendii causa.

^d *Omnem legem frangit*] *Quicquid coegit, defendit.* Lib. contr. xxvii. Exemplis idem Seneca illustrat in excerptis controversiæ IV. (Lib. IV.) *Necessitas est, quæ navigia jactu exonerat: necessitas est, quæ ruinas incendia operimit: necessitas est les temporis.* Theodorus Priscianus *Vetus Medicus*: *Ex-*

2 Hence it follows, that in extreme necessity, the pristine right of using things revives, as if they had remained common: for in all laws, and thus in the law of ownership, extreme necessity is excepted.

3 Hence the rule, that in a voyage, if the provisions run short, what each one has must be thrown into the common stock. So to preserve my house from a conflagration which is raging, my neighbour's house may be pulled down: and ropes or nets may be cut, of which any ship has run foul, if it cannot be extricated otherwise. All which rules are not introduced by the Civil Law, but by the interpretations of it.

4 For among Theologians also, it is a received opinion, that in such a necessity, if any one take what is necessary to his life from any other's property, he does not commit theft: of which rule the reason is, not that which some allege, that the owner of the property is bound to give

sent quid de ea re sentirent, respondiissent quod dicimus. *Necessitas*, inquit pater Seneca, *magnum humanæ imbecillitatis patrociniū*, ^{Controv. 1v. 27.} *omnem legem* (humanam scilicet, aut ad humanæ modum factam) *frangit*. Cicero Philippica xi: *Cassius* ^{Cap. 12.} *in Syriam profectus est, alienam provinciam, si homines legibus scriptis uterentur: his vero oppressis, suam lege naturæ.* Apud Curtium est: *In communi calamitate suam* ^{Lib. vi. 4.} *quemque habere fortunam.*

VII. Sed cautiones adhibendæ sunt, ne evagetur hæc ^{Less. xl. 12. Dub. 12. n. 70.} licentia: quarum prima sit: omni modo primum tentandum, an alia ratione necessitas evadi possit, puta adeundo magistratum, aut etiam tentando, an rei usus a domino possit precibus obtineri. Plato ex vicini puteo aquam peti ita demum permittit, si quis in suo ad cretam usque foderit ad ^{De Leg. viii. p. 844 a.} aquam exquirendam: et Solon, si in suo foderit ad quadraginta cubitos: ubi addit Plutarchus: ἀπορία γὰρ φέτο δειν ^{Vit. Sol. p. 91.} βοηθεῖν, οὐκ ἀργίαν ἐφοδιάζειν. *arbitratur subveniendum necessitati, non instruendam pigritiam.* Xenophon in responso ad Sinopenses: ὅποι δ' ἂν ἐλθόντες ἀγορὰν οὐκ ἔχωμεν, ἂν τε εἰς βάρβαρον γῆν, ἂν τε εἰς Ἑλληνίδα, οὐκ

pedit prægnantibus in vitæ discrimine constitutis sub unius partus sæpe jactura salutem mercari certissimam, sicut arboribus crescentium ramorum accommodatur salutaris abscissio, et naves pressæ onere cum gravi tempestate jactantur, solum habent ex damno remedium. Prima verba illa ad ἐμβρυοθλάσσην pertinent, cujus instrumenti descriptio apud Gale-

num et Celsum, ac proinde eadem vox restituenda apud Tertullianum *de Anima* [Locus Tertulliani legitur cap. 25. Sed emendatio, quam Auctor heic proponit, ab aliis jam occupata fuerat, etiam ante H. STEPHANUM, qui illam probat, in Thesaurο suo, Tom. i. pag. 796. J. B.]

so much to him that needs it, out of charity: but this, that all things must be understood to be assigned to owners with some such benevolent exception of the Right thus primitively assigned. For if the first dividers had been asked what was their intention, they would have given such a one as we have stated. [Of necessity, see Seneca, Cicero, Curtius.]

VII. But cautions are to be applied, that this liberty go not too far.

First, that we must first endeavour in every way to avoid this necessity in some other manner, as by applying to the magistrate, or by trying whether we cannot obtain the use of things from the owner by entreaty. Plato allows a man to take water from his neighbour's well, if in his own he has dug down to the chalk, seeking water; and Solon, if he has dug in his own ground forty cubits. For as Plutarch says,

ὑβρει, ἀλλ' ἀνάγκη, λαμβάνομεν τὰ ἐπιτήδεια: ubi *jus emendi nobis non conceditur, sive in Barbarico, sive in Græcanico solo, ibi quæ opus est sumimus, non per proterviam, sed ex necessitate.*

VIII. Secundo, non concedendum hoc si pari necessitate ipse possessor teneatur: nam in pari causa possidentis melior est conditio. *Stultus non est, ait Lactantius, qui tabula naufragum, ne salutis quidem propriæ causa, nec equo saucium dejecerit: quia se abstinuit a nocendo, quod est peccatum, et hoc peccatum vitare sit sapientia.* Cicero dixerat officiorum III. ⁸ *Nonne igitur sapiens, si fame ipse conficiatur, abstulerit cibum alteri, homini ad nullam rem utili? Minime vero. Non enim mihi est vita mea utilior quam animi talis affectio, neminem ut violem commodi mei gratia.* Apud Curtium legitur: *Melior est causa suum non tradentis, quam poscentis alienum.*

IX. Tertio ubi fieri poterit, faciendam restitutionem. Sunt quidam, qui aliter censent hoc argumento, quod qui jure suo usus est, ad restitutionem non obligetur. Sed verius est, jus hic non fuisse plenum, sed restrictum cum onere restituendi ubi necessitas cessaret. Tale enim jus sufficit ad servandam naturalem æquitatem contra rigorem dominii.

⁸ Non agit Cicero de *Caru*, in quo et locus ille male aptatur, et sententia par est utriusque necessitas: adeoque ejus, in se spectata, rigida est ultra

he thought that necessity was to be relieved, not idleness encouraged; and Xenophon says to the Sinopians, If we are not allowed to buy, we must take; not from contempt of Rights, but from necessity.

VIII. Secondly, such liberty is not granted, if the possessor be in like necessity; for *cæteris paribus*, the case of the possessor is the better. Lactantius says, that he does not do amiss who abstains to thrust a drowning man from a plank, or a wounded man from his horse, even for the sake of his own preservation. So Cicero: and Curtius.

IX. Thirdly, that when it is possible, restitution be made. There are some who think otherwise on this point, and consider that, as the man used his own Right, he is not bound to restitution. But it is more true that this Right was not plenary, but limited by the burthen of restoring what was taken, when the necessity was over: for such a Right suffices to preserve the natural equity of the case against the rigour of ownership.

X. Hence we may collect how he who carries on a righteous

X. Hinc colligere est, quomodo ei, qui bellum pium gerit, liceat locum occupare, qui situs sit in solo pacato: nimirum si non imaginarium, sed certum sit periculum, ne hostis eum locum invadat, et inde irreparabilia damna det: deinde, si nihil sumatur, quod non ad cautionem sit necessarium, puta, nuda loci custodia, relicta domino vero jurisdictione et fructibus: postremo, si id fiat animo reddendæ custodiæ simulatque necessitas illa cessaverit. *Enna aut malo, aut necessario facinore retenta*, ⁹ait Livius: quia malum hic, quicquid vel minimum abit a necessitate. Græci, qui cum Xenophonte erant, cum navibus omnino opus haberent, ipsius Xenophontis consilio ceperunt transeuntes, sed ita ut merces dominis intactas conservarent, nautis vero et alimenta darent, et pretium persolverent. Primum ergo quod post dominia ex veteri communione restat jus, est id quod jam diximus necessitatis.

Lib. xxv. 30.

De Exped. Cyr. v. 1.

XI. Alterum est utilitatis innoxisæ. *Quidni enim, inquit Cicero, quando sine detrimento suo potest, alteri communice in iis, quæ sunt accipienti utilia, danti non molesta?* Ideo Seneca beneficium negat dici posse ignis accendendi potestatem. Apud Plutarchum legimus Symposiaca VII. οὐτε γὰρ τροφήν ἀφανίζειν ὅσιον αὐτοὺς ἄδην ἔχοντας, οὔτε νάματος ἐμφορηθέντας, πηγὴν ἀποτυφλοῦν καὶ ἀποκρύπ-

De Offic. I. 16.

De Benef. iv. 29.

Quæst. 4.

modum. J. B.

patebit locum insipienti. J. B.

⁹ Non congruit hoc exemplum, ut

war may lawfully seize a place situate in a land which is not at war; namely, if there be a danger, not imaginary, but certain, that the enemy will seize that place, and thence do irreparable damage: and next, on condition that nothing be taken which is not necessary for this purpose of caution, for example, the mere custody of the place, leaving to the true owner the jurisdiction and the revenues: finally, if it be done with the intention of restoring the custody to the true owner as soon as the necessity is over: Livy says, *Enna retained by a step necessary, or unjustifiable*; because in such a case every thing is unjustifiable which is not necessary. So the Greeks who were with Xenophon, in their need took the ships which they found passing, spared the lading for its owners, fed and paid the sailors. This then is the first Right which, when ownership has been established, remains out of the old community of goods; namely, the Right of Necessity.

XI. Another Right is the Right of Harmless Use. *Why, says Cicero, when a man can without any loss to himself, should he not impart what is useful to the receiver, and not inconvenient to the giver?* So

τειν, οὔτε πλοῦ σημεῖα καὶ ὁδοῦ διαφθεῖρειν χρησαμένους, ἀλλ' ἐὰν καὶ ἀπολείπειν τὰ χρήσιμα τοῖς δεησομένοις μεθ' ἡμῶν. *Nam neque alimenta nobis fas est perdere, ubi ipsi plus satis habemus, neque fontem, postquam inde quantum libet potaverimus, obturare aut occultare, neque signa navigationis aut itineris abolere, quæ nobis usui fuerint.* [*Sed relinquenda ista sunt, ut aliis etiam post nos usui esse possint.*]

XII. Sic flumen, qua flumen dicitur, proprium est populi, cujus intra fines fluit, vel ejus, cujus in ditione est populus: atque ei licet molem in flumen injicere: et quæ in flumine nascuntur, ejus sunt. At idem flumen, qua aqua profluens vocatur, commune mansit, nimirum ut bibi hauririque possit.

*I. Quædam 2.
D. de Rer.
Div. § 1.*

Quis vetet appposito lumen de lumine sumi;

Atque cavum vastas in mare servet aquas?

*Art. Am. III.
93.
Metam. vi.
340.*

Inquit Ovidius: apud quem et Lycios Latona sic alloquitur:

Quid prohibetis aquas? usus communis aquarum est:

Ubi et undas vocat munera publica, id est, hominibus communia, vocis publicæ acceptione minus propria: quo sensu res quædam publicæ juris gentium dicuntur. Virgilius undam eodem sensu dixit cunctis patentem.

Æn. vii. 230.

* *Usus qui prodest his, illimon nocet*] Servius ad vii. *Æneidos*: *littusque rogamus innocuum: cujus vindictio, ait, nulli possit nocere.* (Vers. 230).

[†] *Justum eo nomine bellum*] *Justa bella gerebantur a filiis Israel contra Amorreos*, ait Indicato hic loco Augustinus. Sic Amyntorem Orchomeni re-

Seneca denies that we have a Right to refuse a man permission to light his fire at ours. So in Plutarch, we are not to destroy meat when we have more than we need, nor to conceal or to muddy a spring of water, when we have used it, nor to pull down guide-posts or sea-marks which have done their service to us: they are to be left to be of use to others.

XII. So a river, as it is a river, is the property of the people within whose boundary it flows, or of him under whose authority the people is. He may run a pier into the river; and what is produced in the river is his. But the same river, as it is flowing water, remains common, for drawing or drinking: so Ovid. Water is in this way public property. So Virgil.

XIII. 1 And so land, and rivers, and any part of the sea which is become the property of any people, ought not to be shut against those who have need of transit for just cause; say, because being expelled from their own country they seek a place to settle; or because

XIII. 1 Sic et terræ, et flumina, et aqua pars maris in proprietatem populi alicujus venit, patere debet his qui transitu opus habent ad causas justas; puta, quia suis finibus expulsi querunt terras vacuas, aut quia commercium expetunt cum gente seposita, aut etiam quia quod suum est justo bello petunt. Ratio hic eadem quæ supra, quia dominium introduci potuit cum receptione talis usus, qui prodest his, illis non nocet: ideoque dominii auctores id potius censendi sunt voluisse.

Bal. iii.
cons. 193.

2 Exemplum habemus insigne in Mosis historia, qui cum transeundum haberet per alienos fines, primum Idumæo, deinde Emoræo has tulit leges, iturum se via regia, nec deflexurum ad possessiones privatas. Si qua re ipsorum haberet opus, justum pretium eis persolaturum. Quæ conditiones cum repudiarentur, justum eo nomine bellum intulit Emoræo. *Innoxius enim transitus denegabatur*, inquit Augustinus, *qui jure humanæ societatis æquissimo patere debebat*.

Numb. xx. et
xxi.

3 Græci, qui cum Clearcho: πορευοίμεθα δὲ ἂν οἴκαδε, εἰ τις ἡμᾶς μὴ λυποῖν ἀδικούντα μὲν τοι πειρασόμεθα συν τοῖς θεοῖς ἀμύνασθαι. *Domum ibimus, si nemo molestus sit: si quis injuriam faciat, eum Deorum ope arcere cona-*

Lib. qu. 44.
super Numb.
ad cap. 30.

Apud Xenop.
De Exp. Cyr.
ii. 3. § 12.

gem ob negatum transitum interfecit Hercules, notante id Apollodoro (*Bibl. Lib. ii. c. 7, § 7*). Græci Telephum bello petiere, quod eos per fines suos

transire passus non esset: notat Scholiastes ad Horatii carmen (*Epod. xvii. 8*) in Canadum. Adde *legem Longobardicam*, Lib. ii. Tit. liii. cap. 2.

they seek traffic with a remote nation; or because they seek their own in a just war. The reason is the same as above; that ownership might be introduced with the reservation of such a use, which is of great advantage to the one party and of no disadvantage to the other; and the authors of ownership are to be supposed to have intended this*.

2 We have a valuable example of this in the history of Moses, who applied first to the Edomites, and then to the Amorites (Numb. xx. and xxi.), for leave to pass through the land on condition of going by the king's high way, and paying for what they took. And when these conditions were rejected, he on that account made war on the Amorites; justly, as Augustine says.

3 The Greeks, of the ten thousand under Clearchus, claimed the same Right; so Agesilaus, Lysander, the Batavi, Cimon. The middle

* Gronovius in a long note gives very strong reasons why this Right of Transit cannot be held, and cases in which it has been negatived.

Plut. Apop.
p. 211 c.

Ibid. p. 229 c.

Hist. iv. 20.

Plut. Cimo.
p. 429 c.

binur. Nec multo aliter ^a Agesilaus, cum ex Asia rediens ad Troadem venisset, interrogavit, ut amicum se an ut hostem transire vellent: Et ^b Lysander Bœotios, rectis se hastis transire vellent, an inclinatis. Batavi apud Tacitum Bonnensibus nuntiant: *Si nemo obsisteret, innoxium iter fore: sin arma occurrant, ferro viam inventuros.* Cimon quondam Lacedæmoniis suppetias laturus per agrum Corinthium traduxerat copias. Reprehensus a Corinthiis quod non prius civitatem compellasset: nam et qui fores alienas pulset, non intrare nisi domini permissu: *At vos, inquit, Cleonæorum et Megarensium fores non pulsastis, sed perfregistis, censentes omnia patere debere plus valentibus.* Media sententia vera est, ⁱ postulandum prius transitum; sed si negetur, vindicari posse. ^k Ita Agesilaus ex Asia rediens cum a rege Macedonum transitum postulasset, atque is consultaturum se dixisset: *Consultet, inquit, nos interea transibimus.*

4 Neque recte excipiet aliquis metuere se multitudinem transeuntium. Jus enim meum metu tuo non tollitur: eoque minus, quia sunt rationes cavendi, ut si divisis manibus trans-

^a *Agesilaus*] Vide etiam in ejus vita hac de re Plutarchum. (Pag. 604).

^b *Lysander*] Et in hujus vita eundem. (Pag. 445 D.)

ⁱ *Postulandum prius transitum*] Aristophanes *Avibus* (vers. 188):

Εἰς ὅσπερ ἡμεῖς ἦν ἰέναι βουλαίμεθα
Πυθιάδα Βοιωτῶν διόδον αἰτούμεθα.

Ut nos, cum nobis Delphos sumendum esset iter,

Prius Bœotos transitum depocimus,

Ubi Scholiastes: *τότε μόνον διόδον ζητοῦσιν, ὅταν στρατεύμα διάγῃ, τότε demum iter poscitur, ubi exercitus traducitur.* Veneti et Germanis, et Gallis

de Marano certantibus iter præbuere. Paruta xi. Idem Germanis conquestibus de transitu hostibus dato, ostendunt id nisi armis impediri non potuisse, quibus uti non mos sibi, nisi in hostes manifestos: eodem libro. Sic et Pontifex se excusat, libro ejusdem xii.

^k *Ita Agesilaus ex Asia rediens a rege Macedonum*] Etiam hac de re Plutarchum in ejus vita inspice. (Pag. 604.)

ⁱ *Si inermes*] Exemplum in excerpto legationum xii. et apud Bembum L. vii. *Historiæ Italicæ*. [Immo *Venetæ*, fol. 104. *Ed. Ven. 1551.*] Vide et notabilia pacta de transitu inter Fredericum

opinion is the true one; that a transit is first to be requested; but if denied, may be asserted by force. So Agesilaus, when the king of Macedon, thus applied to, said he would consult, replied, *Let him consult, meantime we shall pass through.*

4 Nor can any one properly object that he is afraid of the multitude of those who make the transit. For my Right is not taken away by your fear; and this the less, because there are ways of providing against danger; as by sending the body of persons in small parties, and without arms, as the Cologne proposed to the Germans; by placing guards at the expense of the transit-seekers; by taking

mittantur copiae, ¹si inermes, quod Agrippinenses Germanis dicebant: quem morem antiquitus in Eleorum regione observatum notavit Strabo: si impensa transeuntis, is qui transitum concedit, sibi praesidia idonea conducatur: ²si obsides dentur, quod a Demetrio Seleucus postulabat, ut eum intra sui imperii fines subsistere sineret. Sic etiam metus ab eo in quem bellum justum movet is qui transit, ad negandum transitum non valet. Neque magis admittendum si dicas, et alia posse transiri: tantundem enim quivis diceret, atque eo modo jus transeundi plane interimeretur: sed satis est si sine dolo malo transitus postuletur, qua proximum ac commodissimum est. Plane si injustum moveat bellum, qui transire vult, ³si hostes meos secum ducat, negare transitum potero: nam et in suo ipsius solo ei occurrere atque iter impedire fas esset.

5 Neque vero personis tantum, sed et mercibus transitus debetur. ¹Nam quominus gens quaeque cum quavis gente seposita commercium colat, impediendi nemini jus est: id enim permitti interest societatis humanae; nec cuiquam damno id est: nam etiam si cui lucrum speratum, sed non debitum, de-

Barbarossum et Isacium Angelum apud Nicetam libro II. (cap. 4 et 7) de vita ejusdem Isacii aliquot locis: in imperio Germanico transitum postulans de damno resarciendo cavet: vide et Crantzium *Saxoniarum* x. et Mendosam *In Belgicia*. Caesar Helvetiis iter per provinciam noluit concedere, quod homines inimico animo existimabat non temperaturos ab injuriis et maleficio: *De Bello Gallico*, Lib. I. [cap. 7, 8. Ex quo Auctore sit *Excerptum Legat.* initio istius notae indicatum, omisit Auctor, aut Typographus, in omnibus Editt. nec in ulla Collectione ejusmodi *Ex-*

cerptorum invenire potui.]

² Si obsides dentur] Exemplum habes Procopii *Persicorum* II.

³ Si hostes meos secum ducat] Hoc dicebant Franci, qui in Venetia erant, Narseti Longobardos secum ducenti, *Gotthicorum* IV. (see *Hist. Misc.* c. 26). Alia negati itineris exempla habes apud Bembum libro VII. *Italicorum* [*Hist. Venet.* eodem loco, qui in Nota antepenultima indicatus est:] apud Parutam libro *Historiae Venetae*, v. et VI.

¹ Vide PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. III. cap. 3, § 6, cum Notis nostris. J. B.

hostages. So too fear of war from him against whom the transit-seeker makes a righteous war, does not justify him in refusing. Nor is it enough to say that he may pass another way: for every one might say the same, and thus the Right of Transit be destroyed. It is enough if he pass *bona fide* by the shortest and most convenient way. If indeed he who seeks transit makes an unjust war, or brings my enemies with him, I may deny the transit; for in such a case I might meet him on his own ground and stop his way.

5 Transit is to be granted not only to persons, but to merchandize; for no one has a right to impede one nation in cultivating trade

Tac. Hist.
IV. 65.

Lib. VIII. p.
358.

cedat, id damni vice reputari non debet. Testimoniis, quæ ad hanc rem produximus alibi, addemus unum * ex Philone: *πᾶσα δὲ θάλαττα φορτηγοῖς ὀλκάσιν ἀκινδύνως διαπλεῖται, κατὰ τὰς ἀντιδόσεις ὧν ἀλλήλαις ἀγαθῶν ἀντεκτίνουσιν αἱ χώραι κοινωνίας ἰμέρῳ, τὰ μὲν ἐνδέοντα λαμβάνουσai, ὧν δὲ ἄγουσι περιουσίαν ἀντιπέμπουσai. φθόνος γὰρ οὐδέποτε πᾶσαν τὴν οἰκουμένην ἐκράτησεν, ἀλλ' οὐδὲ τὰς μεγάλας αὐτῆς ἀποτομὰς. Mare omne navibus onerariis tuto satis navigatur, pro commercio quod ex naturalis societatis desiderio inter nationes intercedit, dum mutuo aliarum copia aliarum inopiæ succurrit. Nam invidia nunquam aut orbem universum, aut magnas ejus partes invasit. Alterum ex Plutarcho, qui de mari sic loquitur: ἄγριον ὄντα καὶ ἀσύμβολον τὸν βίον τοῦτο τὸ στοιχείον συνῆψε καὶ τέλειον ἐποίησε, διορθούμενον ταῖς παρ' ἀλλήλων ἐπικουρίαις, καὶ ἀντιδόσεσι κοινωνίαν ἐργαζόμενον καὶ φιλίαν. Vitam nostram feram alioqui et commerciorum exsortem, hoc elementum sociavit atque perfecit, supplens quod deerat ope mutua, et permutatione rerum societatem amicitiamque concilians. Quicum convenit Libanii illud: οὐ μὲν τοι πάντα γε πᾶσιν ἐνειμε μέρεσιν, ἀλλὰ διήρει τὰ δῶρα κατὰ τοὺς χεῖρους, εἰς κοινωνίαν τοὺς ἀνθρώ-*

Aqu. et Ign.
Comp. p. 957.

* Ex Philone.] In legatione ad Caicum. (Pag. 998, 999.)

¶ *Eo commercio quod ex naturalis societatis desiderio inter nationes intercedit*] Servius ad *Eclogam* iv. (vers. 37) *navigatio ex mercimonii ratione descendit*. Idem ad *Georgicon* i. (vers. 137) *significat, necessitate quarendarum rerum homines navigandi peritiam ac studium reperisse, commune bonum erat patere commercium maris*. [Ultima verba, *Commune bonum*, &c., non sunt Servii, sed Senecæ, *De Benef.* i. 8. J. B.] Ambrosius in opere *De Creatione* (seu *Hexæmer.* Lib. iii. cap. 5): *Bonum mare tanquam hospitium futurorum,*

fons imbrium, derivatio alluvionum, invectio commeatuum, quo sibi distantes populi copulantur: quæ ex Basilio sumpta *Hexæmeri* iv. (Pag. 45, 46, Tom. i. *Ed. Paris.* 1638.) *Mare forum mundi, insulas stationes in mari, eleganter dixit de providentia* ii. Theodoretus. Adjungam his Chrysostomi ad *Stelechium* verba: τί δὲ τις εἰποι τὴν πρὸς ταῖς ἐπιμιξίας εὐκόλιαν γενομένην ἡμῖν; ἵνα γὰρ μὴ τῆς ὁδοιπορίας τὸ μῆκος ἀποτροπὴ γίγνοιτο τῆς συνοσίας τῆς πρὸς ἀλλήλους, ἐπιτομωτέραν ὁδὸν τὴν θάλατταν ἀνήκε παρταχοῦ τῆς γῆς ὁ Θεός ἵνα ὥσπερ οἶκον ἕνα, τὴν οἰκουμένην οἰκοῦντες, οὕτω θαμινὰ πρὸς

with another remote nation; for it is of advantage to the human race that such intercourse should be permitted: nor is that a damage to any one; for if any one misses some gain which he had reckoned upon but never had, that is not to be reckoned loss*. So Philo, Plu-

* Gronovius notes that this is much too lax and liberal, and contrary to the practice of nations, as he shews by examples.

πους ἄγων τῇ παρ' ἀλλήλων χρεία. καὶ φαίνει δὴ τὰς ἐμπορίας, ὅπως τῶν παρ' ἐνίοις φυομένων κοινὴν εἰς ἅπαντας ἐνέγκῃ τὴν ἀπόλαυσιν. *Deus non omnia omnibus terræ partibus concessit, sed per regiones dona sua distribuit, quæ homines alii aliorum indigentes ope societatem colerent. Itaque mercaturam excitavit, ut quæ usquam nata sunt, iis communiter frui omnes possent.* Euripides quoque Supplicibus Thesea inducens loquentem, his quæ humana ratio in commune bonum reperit, navigationem annumerat, his verbis (vers. 210):

Πόντου τε ναυστολήμαθ', εἰς διαλλαγὰς
ἔχοιμεν ἀλλήλοισιν ὃν πένοιο γῆ.

Et cuique terræ, quæ suum ingenium negat,
Supplere ratium pelagiis discursibus.

Apud Florum est: *Sublatis commerciis, rupto fœdere generis Lib. III. 6. humani.*

XIV. 1 Sed quæritur, an ita transeuntibus mercibus terra, aut amne, aut parte maris, quæ terræ accessio dici possit, vectigalia imponi possint ab eo, qui in terra imperium habet. ²Certe quæcunque onera ad illas merces nullum habent respectum, ea mercibus istis imponi nulla æquitas patitur.

ἀλλήλους βαδίζομεν, καὶ τῶν παρ' ἑαυτῷ ἕκαστος τῷ πλησίον μεταδίδου ἐύκολως ἀντιλαμβάνη τὰ παρ' ἑκείνου, καὶ μικρὸν τῇ γῆς μέρος κατέχων ὥσπερ ἀπάσης κύριος ὢν, τῶν πανταχοῦ γινομένων ἀπολαύει καλῶν. καὶ νῦν ἔξεστι καθάπερ ἐπὶ τραπέζῃς πλουσίας, ἕκαστον τῶν δαιτυμόνων τὸ παρατεθειμένον αὐτῷ δόντα τῷ πόρρωθεν κατακειμένῳ, τὸ παρακείμενον ἀντιλαβεῖν, τὴν χεῖρα μόνον ἐκτείναντα. *Quomodo autem satis digne quis explicet facilitatem ad mutua commercia nobis datam? Ne enim itineris longitudo impedimentum aliorum ad alios commensibus adferret, breviorē viam, mare*

scilicet, ubique terrarum disposuit Deus, ut mundum tanquam unam domum communiter inhabitantes, crebro nos invicem viseremus, et apud se nata quisque alteri communicans vicissim commode acciperet res apud illum abundantes, ac sic exiguam tenens terræ partem, ita tanquam si teneret universam, frueretur ejus, quæ ubivis sunt, bonis. Licet itaque nunc tanquam in communi mensa convivarum unicuique ea quæ sibi appositæ dare alteri longius accumbenti, ac contra quæ apud ipsum sunt, accipere manu tantum extenta. (Tom. VI. Pag. 157.)

² Propter transitum solum potest

tarch, Libanius, Euripides, Florus.

XIV. 1 It is made a question whether, when merchandize thus passes through a country, the Rulers of that country may impose a transit-duty. And certainly whatever taxes have no respect to the articles of merchandize, cannot equitably be imposed on them. So

Sic nec capitatio, civibus imposita ad sustentanda reipublicæ onera, ab exteris transeuntibus exigi potest.

2 Sed si aut ad præstandam securitatem mercibus, aut inter cetera etiam ob hoc onera sustinentur, ad ea compensanda vectigal aliquod imponi mercibus potest, dum modus causæ non excedatur. ¹Inde enim pendet justitia, ut tributum ita et vectigalis. Sic vectigal equorum et neti, quæ Isthmum Syriacum transibant, accepit rex Solomo. De thure Plinius: *Evehi non potest, nisi per Gebanitas.* ²Itaque et horum regi penditur vectigal. Sic ditati Massilienses ex fossa quam ex Rhodano in mare Marius duxerat, *πρᾶττόμενοι τοὺς ἀναπλέοντας καὶ τοὺς καταγομένους*: ³“vectigal exigentes ab iis, qui navibus ascenderent aut descenderent, ut Strabo narrat libro quarto. Idem libro octavo nos docet, Corinthios ab antiquissimis usque temporibus vectigal percepisse de mercibus, quæ ad vitandum Maleæ flexum, terra de mari in mare transferebantur. Sic pro Rheni transitu pretium accipiebant Romani. *Etiam in pontibus pro transitu datur*, inquit Seneca. Et de fluminum transitu pleni sunt jurisconsultorum libri.

3 Sed frequens est ut æquus modus non servetur, cujus rei Phylarchos Arabum incusat Strabo, hoc addito: *χαλεπὸν*

omnino aliquid exigi, eodem jure, quo rei suæ usu quivis alios arceat. Dicemus in Notis Gallicis. Interim vide quæ scripsimus in PUFENDORF. *De Jure Nat. et Gent.* Lib. III. cap. 3, § 7, ultimæ Editionis. *J. B.*

¹ *Inde enim pendet justitia, ut tributum ita et vectigalis*] Vide *Legem Longobardicam*, Libro III. Titulo 1. cap. 31, 33. et epistolam Episcoporum ad Ludovi-

cum regem, quæ inter capitula legitur Caroli Calvi, cap. 14.

² *Itaque et horum regi penditur vectigal*] Simile apud Leonem Afrum non longe ab initio. [Forte Pag. 47, *Ed. Elzevir.* 1632.]

³ *Vectigal exigentes ab iis, qui navibus ascenderent aut descenderent*] Huc alludens Aristophanes in *Avibus* vult interstrui aërem, ut Dil cogantur de

neither a capitation tax, nor taxes for the general purposes of the State, can be required of foreigners passing through.

2 But if, either to provide security for the merchandize, or for this along with other objects, a burthen fall on the country, a tax may be imposed on the merchandize, if it do not go beyond the measure of the cause. That is the measure of the equity, as of other taxes, so of duties on merchandize. Thus Solomon (1 Kings x. 28) had a tax upon horses and linen yarn which passed the isthmus of Suez. So transit duty was demanded by the Gebanites, Massilians, Corinthians, Romans. And the jurists have much to say of the passage of rivers.

3 But this limit is often transgressed; as by the Arabian chiefs.

1 Reg. x. 28.

Hist. Nat.
xii. 14.

p. 183.

p. 378.

Tacit. Hist.
iv. 65. n. 6.
De Const.
Sapient. 14.
Chop. de Do.
i. Tit. 9.
Perey. l. 1.
De Jure
Fisci. l. n. 22.
Aug. Cons.
189.
Zabar. Cons.
56. Firm.
Intr. de
Gobell.
Lib. xvi. p.
748.

γὰρ ἐν τοῖς τοσούτοις καὶ τοῖς αὐθαδέσι κοινὸν ἀφορισθῆναι μέτρον τὸ τῷ ἐμπόρῳ λυσιτελές· *Difficile enim est, ut inter validos et feroces definiatur modus mercatori non gravis.*

XV. 1 Morari quoque aliquantisper prætervehentibus aut prætereuntibus, valetudinis, aut alia qua justa de causa, licere debet: nam est et hoc inter utilitates innoxias. Itaque Ilioneus apud Virgilium, cum Trojani in terra Africa consistere vetarentur, Deos judices audet invocare: et probata Græciæ querela Megarensium adversus Athenienses, qui eos portubus suis arcebant, *παρὰ τὰ κοινὰ δίκαια, contra jus commune*, ut Plutarchus loquitur: ita ut Lacedæmoniis nulla belli causa justior visa fuerit³.

Vict. de Indis. Relect.
2. n. 1.
Æn. l. 543,
et seqq.

Pericles, p.
168 n.
Diod. xii. p.
306. *Thuc.*
l. 67.

2 Cui et hoc consequens est, ut tugurium momentaneum ponere liceat, puta in littore, etiamsi littus a populo occupatum concedamus: nam quod decretum prætoris adhibendum dixit Pomponius, ut in littore publico vel mari extruere quid liceat, ad permanentia sœdificia pertinet: quo et illud poëtæ:

Horat. l. Od.
l. 33.

Contracta pisces sequora sentiunt
Jactis in altum molibus.

XVI. Sed et perpetua habitatio his, qui sedibus suis exclusi receptum quæerunt, ⁴deneganda non est externis, dum et

victimarum nidore vectigal pendere.
[Vers. 190, et seqq.]

¹ *Itaque Ilioneus*] Servius ad eum locum: *Occupantis enim est possessio littoris: unde ostenduntur crudeles, qui etiam a communibus prohibeant*, Laomedon ab Hercule occisus quod eum Trojæ portu pelleret, Servio ibidem narrante. [Non, sed ad vers. 619.]

³ Hoc erat contra fœdera. Deinde

libertatem commerciorum, non vero facultatem tantum aliquantisper morandi, de qua agitur heic, *Megarensibus Athenienses*, denegabant. Inspice Auctorum loca in margine a me distinctius designata. *J. B.*

⁴ Vide PUFENDORF. *De Jure Nat. et Gent.* Lib. III. cap. 3. § 10, et seqq. ubi hæc questio, et sequentes accuratius expenduntur. *J. B.*

XV. 1 It ought also be permitted to those that travel through the land, to tarry there for a short time for the sake of health or other just cause; for this also is a harmless use. So Ilioneus in Virgil; and when the Megareans complained that the Athenians excluded them from their ports *contrary to the known rules of justice*, their complaint was approved by the Greeks.

2 It is consequent upon this, that the transit-maker may erect a momentary hut, on the shore for instance, though the shore be occupied already. For the rule that it requires the order of a judge to build on the shore or in the sea, refers to permanent structures.

XVI. Further, a place of settlement is not to be denied to

imperium, quod constitutum est, subeant, et quæ alia ad vitandas seditiones sunt necessaria: quam æquitatem recte observavit divinus poëta, cum Æneam inducit has ferentem conditiones (*Æn.* xii. 192):

Socer arma Latinus habeto,
Imperium solenne socer.

Ant. Rom.
l. 56. Et apud Halicarnassensem Latinus ipse æquam esse dicit Æneæ causam, si sedium inopia compulsus eo advenisset. *Lib. xvii. p. 802.* Barbarorum est hospites pellere, ait ex Eratosthene Strabo: *De Offic. lib. 7.* nec probati hac in parte Spartani. Ambrosio quoque iudice illi, qui peregrinos urbe prohibent, nequaquam probandi. Sic *Herod. i. 150.* Æoles Colophonios, Rhodii Phorbantem ejusque socios, Cares *Paus. vii.* Melios, Lacedæmonii Minyas, Cumæi alios ad se adventantes *Diod. v. 282.* exceperunt. At de iisdem Minyis recte Herodotus, cum re- *Herod. iv. 45.* cepti partem imperii poscerent, ait eos *Oros. vii.* ἐξυβρίσαι καὶ ποιῆσαι οὐχ ὄσια, *Lib. iv. 146.* injuriosos fuisse et fecisse quæ facere fas non erat: beneficium ab illis in injuriam versum dixit Valerius *Lib. iv. 6.* *ext. 3.* Maximus.

XVII. Sed et si quid intra territorium populi est deserti ac sterilis soli, id quoque advenis postulantibus concedendum est, aut etiam ab illis recte occupatur, quia occupatum censi non debet, quod non excolitur, nisi imperium quod attinet, quod populo veteri salvum manet. Trojanis data a Latinis Aboriginibus jugera duri atque asperrimi agri septingenta,

« *Ut Servius notat*] Ex Catone, Senna, aliisque veterum.

» *Separare a commerciis communis parentis*] Plutarchus *Pericle de Mega-*

foreigners who are expelled from their own country; provided that they submit to the constituted government, and such other regulations as are requisite to avoid confusion. So Virgil, Dionysius of Halicarnassus, Eratosthenes, the Eolians, Rhodians, Carians, Lacedæmonians, Cumæans. But when the Minyans coming thus, asked the Lacedæmonians to share their power with them, they were injurious aggressors, as Herodotus speaks; and Valerius says that they turned a benefit into an injury.

XVII. And if there be any portion of the soil of a territory desert and barren, that also is to be given up to immigrants who ask for it; or even may be rightly occupied by them; because that which is not cultivated, is not to be conceived as occupied, except as to the ownership, which continues to be in the old people. So the Latin Aborigines granted land to the Romans; so Dio Prusænsis says; so the Ansibarii in Tacitus held: though their general doctrine was wrongly

"ut Servius notat. Apud Dionem Prusæensem oratione VII. Ad Lib. xi. Edn. v. 316. p. 105 c.
 legimus: οὐδὲν ἀδικοῦσιν οἱ τὴν ἀργὴν τῆς χῶρας ἐργα-
 ζόμενοι: nihil peccant qui partem terræ incultam colunt.
 Clamabant olim Ansibarii: sicut cælum Diis, ita terras generi
 mortaliū datas, quæque sint vacuæ, eas publicas esse: So-
 lem, quin etiam et sidera respicientes quasi coram interro-
 gabant, vellentine contueri inane solum: potius mare super-
 funderent adversus terrarum ereptores. Sed male dicta hæc
 generalia rei præsentī aptabant: nam terræ illæ non omnino
 erant vacuæ, sed pascendis pecoribus et armentis militum ser-
 viebant: quæ justa Romanis negandi causa. Nec minus juste
 jam olim Romani ex Gallis Senonibus quærebant: quod jus Liv. v. 38.
 esset agrum a possessoribus petere, aut minari arma?

XVIII. Post jus commune ad res sequitur jus commune
 ad actus: quod datur aut simpliciter, aut ex suppositione.
 Simpliciter datur hoc jus ad actus tales, quibus ea comparan-
 tur, sine quibus vita commode duci nequit. Non enim par
 hic necessitas requiritur ut in re aliena arripienda: quia hic
 non agitur de eo, quod fiat domino invito, sed de modo
 acquirendi dominis volentibus: tantum ne id aut lege lata,
 aut conspiratione impedire liceat. Est enim tale impedim-
 entum naturæ societatis contrarium in his, quas dixi, rebus.
 Hoc est, quod Ambrosius vocat, ^{De Offic. III. 7.} *separare a commerciis com-
 munitis parentis, fusos omnibus partus negare, consortia vi-*

rentibus (pag. 168 B): αἰσιώμενοι πᾶ- ὧν Ἀθηναῖοι κρατοῦσιν εἰργεσθαι, καὶ
 σης μὲν ἀγορᾶς, πάντων δὲ λιμένων, ἀπελαύνεσθαι παρὰ τὰ κοινὰ δίκαια.

applied in that case; for the lands were occupied: so the Romans
 rightly resisted the Senones on the same ground.

XVIII. After the Common Right to things follows the Common
 Right to acts; and this is given either simply or hypothetically.
 There is given simply a Right to those acts without which life cannot
 conveniently be sustained, and others which may be compared with
 these. The same necessity is not required here, as in taking what
 belongs to another; for here we do not speak of what may be done,
 the owner being unwilling; but of the mode of acquiring things with
 the owner's consent; asserting only, that he may not prevent the
 acquisition either by law or by conspiracy. For such impediment in
 such matters is contrary to the nature of human society. This is,
 as Ambrose says, to separate ourselves from the intercourse of our
 common parent; to deny what is given for all; to tear up the root
 of our common life. For we do not now speak of superfluities, the

vendi averruncare. Nam de supervacuis et mere voluptariis non agimus, sed de his quæ vita desiderat, puta alimentis, vestimentis, medicamentis.

XIX. Ad hæc igitur æquo pretio comparanda jus esse omnibus hominibus asseveramus: demto, si a quibus petitur ipsi ejus rei indigeant: ⁷quomodo in summa penuria frumenti venditio prohibetur. Et tamen ne in tali quidem necessitate expelli posse admissos semel peregrinos, sed commune malum communiter tolerandum ostendit indicato jam loco Ambrosius.

Covar. *Var. Res.* iii. 14.
Ibid. Tert. p. 270.

Molina *Disp.* 106. *Ægi. Reg. de Act. Supernat.* Disp. 31.
Dub. 2. n. 62.
Cœs. *Bell. Gall.* xi. 18.
Lib. xvi. p. 784.

XX. Ad sua autem vendenda non æquum jus est: nam cuilibet liberum est statuere, quid velit acquirere aut non. Ita vinum et alias merces exoticas olim non recipiebant Belgæ. Et de Arabibus Nabatæis Strabo, εἰσαγώγιμα δ' ἐστὶ τὰ μὲν τελέως, τὰ δ' οὐ παντελῶς: *'importare merces quasdam licet, quasdam non item.*

XXI. 1 In hoc jure, quo diximus, inesse censemus etiam libertatem matrimonia ambiendi et contrahendi apud vicinas gentes: puta, si virorum populus aliunde expulsus alio advenit: ⁵nam sine femina sætatem agere etsi humanæ naturæ

Dequerebantur omni se mercatu, omni portu, quem tenerent Athenienses, arceri depellique contra gentium jura. Seneca epistola LXXXVII. recitato Virgillii loco (Georg. i. 53):

Et quid quæque ferat regio et quid quæque recuset.

Ista in regione descripta sunt, ut necessarium mortalibus esset inter ipsos commercium, si invicem alius ab alio aliquid peteret. Idem Naturalium v. 18. Quid quod omnibus inter se populis commercium dedit, et gentes dissipatas locis miscuit? Vide Anglorum querelas de

mere instruments of pleasure; but of the necessities of life, food, clothing, medicaments.

XIX. We say then that these things, all men have a Right to purchase at a fair price; excepting when they from whom they are asked, themselves need them: as in a great scarcity of corn, it is forbidden to be sold. And yet even in such a necessity, foreigners once admitted cannot be expelled, but the common evil is to be borne in common, as Ambrose says.

XX. We have not the same Right to sell what we have; for every one is free to decide what he will acquire, and what not. Thus formerly the Belgians would not admit wine and other foreign merchandize: and the Arabians admitted some articles and not others.

XXI. 1 In the Right of which we speak is included, we conceive, the Right of seeking and making marriages with neighbouring nations: if for instance, a population entirely male expelled from some other place come thither. For to live without marriage, though

non omnino repugnat, repugnat tamen naturæ plerorumque hominum. Cœlibatus enim non nisi excellentibus animis convenit. Quare facultas comparandi uxores adimi viris non debet. Romulus apud Livium vicinos rogat, ne graventur homines cum hominibus sanguinem et genus miscere. Canuleius apud eundem: *Connubium petimus, quod finitimis externisque dari solet. Jure belli injuste negatas nuptias juste victor auferret*, Augustino iudice.

Lib. i. 2.

Lib. iv. 3.

De Civ. Dei,
li. 17.

2 Leges autem civiles aliquorum populorum, quæ connubia exteris negant, aut ea ratione nituntur, quod temporibus, quibus sunt conditæ, nulli erant populi, quibus non feminarum copia suppeteret, aut non de quibusvis connubiis agunt, sed de iis, quæ justa sunt, hoc est, quæ speciales quosdam juris civilis effectus producant.

XXII. Ex suppositione jus commune est ad actus, quos populus aliquis externis promiscue permittet. Nam tunc si unus populus excludatur, ei fit injuria. Sic, si externis alicubi venari, piscari, aucupari, margaritas legere licet, si ex testamento capere, si res vendere, si etiam extra penuriam feminarum conjugia contrahere, uni populo id negari non

Vict. d. Rel.
2. n. 2. 3.

Hispanis apud Thuanum libro LXXI. in historia anni cdo Io LXXX.

1 Quomodo in summa penuria frumenti venditio prohibetur] Cassiodorus i. epistola XXXIV. *Copia frumentorum debet provincia primum prodesse, cui nascitur.*

2 Importare merces quasdam licet, quasdam non item] Vide Crantizium Saxoniecorum xi. (Cap. 3.)

3 At vero necesse non est, ut Populus, sive virorum, sive utriusque sexus, numquam interest. Plura diximus in notis Gallicia. J. B.

not entirely repugnant to human nature, is repugnant to the nature of most men. Celibacy suits only superior minds: therefore men ought not to be deprived of the means of getting wives. So Romulus in Livy: so Canuleius. So Augustine.

2 The Laws of some nations, which deny marriage to strangers, either depend on this ground, that at the time when they were made there was no people which had not a sufficient supply of women; or they do not treat of marriage in general, but of that marriage which is legitimate in a peculiar sense, that is, which produces some special kind of legal effects.

XXII. The Right *hypothetical* to acts, refers to acts which any nation has permitted to strangers generally: in this case, if one people be excluded from such acts, it is wronged. Thus if it be permitted to strangers to catch beasts, fish, birds, in certain places, or to get pearls; to take legacies, to sell goods, to contract marriages, even without the plea of want of women, that cannot be denied to one particular people,

Jud. xx.

potest; nisi delictum præcesserit: qua de causa Benjaminitis Hebræi ceteri ademerunt connubii facultatem.

Disp. 105.

XXIII. Sed de permissis quod diximus, intelligendum est de his, quæ permissa sunt tanquam ex vi naturalis libertatis nulla lege sublata: non si permissa sint per beneficium, relaxando legem: nam in beneficii negatione nulla est injuria. Atque ita arbitramur conciliari posse, quod post Franciscum Victoriam quasi ei contrarius notavit Molina.

XXIV. Quæsitum memini, an populo alicui liceat cum alio populo pacisci, ut is populus certi generis fructus, qui alibi non nascuntur, sibi soli vendat. Licere censeo, si is, qui emit populus paratus sit aliis vendere æquo pretio: nam aliarum gentium non interest, a quo emanat quod ad desideria naturæ attinet. Lucrum autem alter alteri prævertere licite potest, maxime si causa subsit, ut si qui id stipulatus est populus alterum populum in suam tutelam receperit, sumtusque eo nomine faciendos habeat. Talis autem coëmptio, eo quo dixi animo facta, juri naturæ non repugnat, quanquam solet interdum ob utilitatem publicam legibus civilibus prohiberi.

except on account of a delinquency; on which account the rest of the Hebrews took away from the Benjamites the right of intermarriage with them.

XXIII. But what is said of such permissions, is to be understood of such things as are permitted in virtue of natural liberty not taken away by law; not of those things which are permitted by indulgence, as a relaxation of law: for there is no wrong in denying an indulgence. And thus Francis Victoria and Molina may be reconciled.

XXIV. I recollect a question raised, Whether it be lawful for one people to make an agreement with another, that they will sell to them alone fruits of a certain kind, which grew nowhere else. I conceive it to be lawful, if the buying people be ready to sell them to others at an equitable price: for it makes no difference to other nations, from whom they buy what gratifies their natural desires. And one party may anticipate another in a gainful trade; especially if the people making this bargain have taken the other people under its protection, and have incurred expense on that account. Such forestalling and monopoly, made with the intention which I have described, is not contrary to Natural Law; although sometimes it is prohibited by Civil Law, on account of public utility.

CAPUT III.

DE ACQUISITIONE ORIGINARIA RERUM, UBI DE MARI ET FLUMINIBUS.

- | | |
|--|--|
| I. <i>Originariam acquisitionem fieri per divisionem aut occupationem.</i> | XII. <i>Talem occupationem jus non dare impediendi transitus innoxii.</i> |
| II. <i>Rejiciuntur hic alii modi, ut concessio juris incorporalis.</i> | XIII. <i>Imperium in partem maris occupari posse, et quomodo.</i> |
| III. <i>Item specificatio.</i> | XIV. <i>Vectigal navigantibus mari ex certis causis imponi posse.</i> |
| IV. <i>Occupatio duplex, ad imperium, ad dominium: quæ distinctio explicatur.</i> | XV. <i>De pactionibus, quæ populum aliquem ultra certos terminos vetant navigare.</i> |
| V. <i>Occupationem mobilium lege posse anteveri.</i> | XVI. <i>Fluminis cursus mutatus an territorium immutet, cum distinctione explicatur.</i> |
| VI. <i>Quo jure nitatur dominium infantium et amentium.</i> | XVII. <i>Quid sentiendum si alveus plane mutatus sit?</i> |
| VII. <i>Flumina occupari posse.</i> | XVIII. <i>Flumen interdum totum accedere territorio.</i> |
| VIII. <i>An et mare?</i> | XIX. <i>Res derelictas occupanti cedere, nisi populus dominium quoddam generale occupaverit.</i> |
| IX. <i>Olim in partibus Romani imperii id non licuisse.</i> | |
| X. <i>Naturæ tamen jus non ob stare in parte maris, quæ terris quasi clausa sit.</i> | |
| XI. <i>Quomodo talis occupatio fiat, et quamdiu duret.</i> | |

I. **S**INGULARI jure aliquid nostrum fit acquisitione originaria aut derivativa. Originaria acquisitio olim, cum genus humanum coire posset, fieri potuit etiam per divisionem, ut diximus, ¹ nunc per occupationem tantum.

II. Dicat forte aliquis, etiam concessione servitutis, constitutione pignoris aliquid originarii acquiri: sed recte expen-

¹ Potest adhuc hodie per divisionem, ut ostendimus in Notis nostris Gallicis. J. B.

CHAPTER III. *Of the original acquisition of property in things: and herein of the Sea and Rivers.*

I. A thing may become our property by acquisition, original or derivative. Original acquisition formerly, when the human race could meet together and agree, might be made by division; at present it is only made by occupation.

II. It may be said perhaps that property may be originally acquired by being given on conditions, as a farm; or deposited as a

denti apparebit id jus novum non esse nisi modo : nam virtute ipsa inerat in dominio domini.

L. Possideri
2. § Genera,
21. D. de Acq.
Poss.

III. Paulus jurisconsultus acquirendi causis et hanc annumerat, quæ maxime videtur naturalis, si quid ipsi, ut in rerum natura esset, fecimus. Sed cum naturaliter nihil fiat nisi ex materia prius existente, ea si nostra fuerit, continuabitur dominium specie introducta : si nullius, ad occupationis genus hæc acquisitio pertinebit : sin aliena, jam naturaliter nobis solis eam non acquiri infra apparebit.

De Benef.
vil. 4.

Orat. xxxl.
p. 324 D.

IV. 1 De occupatione ergo, quæ post prima illa tempora solus est naturalis et originarius modus, videndum est nobis. In his autem, quæ proprie nullius sunt, duo sunt occupabilia, imperium et dominium quatenus ab imperio distinguitur. Seneca ita hæc duo expressit : *“Ad reges potestas omnium pertinet, ad singulos proprietas.* Dion Prussænsis hoc modo : ἡ χώρα τῆς πόλεως ἀλλ’ οὐδὲν ἦττον τῶν κεκτημένων ἕκαστος κύριός ἐστι τῶν ἑαυτοῦ *Regio civitatis est :*

* *Ad reges potestas omnium pertinet, ad singulos proprietas]* Locus est libro VII. de Beneficiis c. iv. sequitur. c. v. *Omnia rex imperio possidet, singuli dominio.* et c. vi. *Cæsar omnia habet : fiscus ejus privata tantum ac sua.* Symmachus x. epist. 54. *Omnia regitis, sed suum cuique servatis.* Philo libro περὶ φυτουργίας* οἱ βασιλεῖς καὶ τῶν κατὰ τὴν χώραν πάντων ὄντες κτημάτων δεσπόται, καὶ ὅσων ἐπικρατεῖν οἱ ἰδιῶται δοκοῦσι, μόνα ταῦτα ἔχειν

νομίζονται ἀπὸ ἐπιτρόποις καὶ ἐπιμεληταῖς ἐγχειρίσαιεν, ἀφ’ ὧν καὶ τὰς ἐτησίους προσόδους ἐκλέγουσιν. *Reges cum sint domini omnium, quæ in ipso sunt ditio, etiam eorum quæ a privatis possidentur, tamen videntur ea tantum habere quæ procuratoribus et rationalibus suis dispensanda committunt, a quibus annuos recipiunt proventus.* (Pag. 222 v. Ed. Paris.) Plinius *Panegyrico : tandem imperium principis quam patrimonium majus est.* (Cap. 50.)

pledge : but on consideration, it will appear that such ownership is not new, except in its form ; by its own virtue, it resided in the ownership of the former owner.

III. Paulus the Jurist adds, to the enumeration of the causes of acquisition this, if we have made anything, so as to cause it to exist. But since, in the course of nature, nothing can be made except out of pre-existing matter, if that matter was ours, the ownership continues when it assumes a new form ; if the matter was no one's property, this acquisition comes under occupation ; if the matter belonged to another, the thing made is not ours alone, as will appear below.

IV. 1 Therefore we have to consider occupation ; which, after that primitive time, is the only natural and original mode of acquisition. In things which are properly no one's, two things are occupable ; the lordship, and the ownership, so far as it is distinguished from the lordship.

at non eo minus in ea suum quisque possidet. Imperium duas solet habere materias sibi subjacentes, primariam personas, quæ materia sola interdum sufficit, ut in exercitu virorum, mulierum, puerorum quærente novas sedes; et secundariam locum, qui territorium dicitur.

2 Quamquam autem plerumque uno actu quæri solent imperium et dominium, ^bsunt tamen distincta: ideoque dominium non in cives tantum, sed et in extraneos transit, manente penes quem fuit imperio. Siculus libro *de Conditionibus Agrorum*: *Auctores assignationis, divisionisque, non sufficientibus agris coloniarum, quos ex vicinis territoriis sumsissent, assignaverunt quidem futuris civibus coloniarum; Sed jurisdictio in agris, ^aqui assignati sunt, penes eos remansit, ex quorum territorio sumti sunt.* Demosthenes oratione de Haloneso, agros, qui eorum sunt, quorum est territorium, vocat ἐγκτήματα, ^aqui in alieno κτήματα.

V. In loco autem, cujus imperium jam occupatum est, jus occupandi res mobiles anteverti posse lege civili supra

^b *Sunt tamen distincta*] Itaque et apud Apollodorum videas, tum Arcadiæ tum Atticæ terras divisas, uno retinente πᾶν τὸ κράτος omne imperium. [*Biblioth.* Lib. III. cap. ix. § 1. et cap. xiv. § 6.]

^a Amplius. GORSIUS legit heic recte *cis agros*, ex vestigio lectionis MSS. et Edd. *cis agris*. Locus est pag. 25. in fin. Editionis, quam curavit idem Vir Doctissimus: qui etiam optime ostendit,

quod divisum fuerat, sed non adsignatum futuris civibus Coloniarum, mansisse illorum, quorum antes fuerat. Quod autem adsignatum fuerat, id omnino accedebat jurisdictioni Coloniarum. Vid. *Antiq. Agrar.* in eodem Volumine, pag. 114. et seqq. Adeoque locus nil ad rem facit. J. B.

^a Permutat heic Auctor sensum vocum Græcarum. Vide locum Oratoris Græci, pag. 84 B. J. B.

Kings have power over all things (the lordship); individuals have property (ownership.) The city is the king's; but nevertheless in the city each has his own. Lordship has two kinds of matter subject to it; primary, persons, which matter alone sometimes suffices; as in the case of a body of people (men, women, and children,) seeking a new settlement; and secondary, a place, which is called a *territory*.

2 Therefore, though lordship and ownership are commonly acquired by one act, they are really distinct. The ownership may pass not only to citizens, but to strangers; while the lordship remains in the same hands as before. So Siculus *De Conditionibus Agrorum*. Demosthenes uses different words for landed property in our own territory and in another.

V. In a place in which the lordship is already occupied, the right of occupying moveable things (as wild beasts, birds, &c.) may be barred

diximus. Est enim hoc jus ex jure naturæ permittente, non præcipiente, ut liceat semper. Neque enim id requirit humana societas. Quod si quis dicat videri jus gentium esse, ut id liceat: respondebo, etiamsi in aliqua parte orbis id communiter ita receptum sit, aut fuerit, non tamen habere vim pacti inter gentes, sed esse jus civile plarium gentium distributum, quod a singulis tolli potest. Et talia multa sunt, quæ juris gentium vocant jurisconsulti, ubi de rerum divisione et acquirendo dominio agitur.

VI. Notandum et hoc, si solum jus naturale spectamus, dominium non dari nisi in eo, qui ratione utitur. Sed jus gentium ob utilitatem communem introduxit, ut et infantes, et furiosi dominia accipere et retinere possent, personam illorum interim quasi sustinente humano genere. Sed nimirum humana jura multa constituere possunt præter naturam: contra naturam nihil. Ideo dominium hoc, quod favore infantium et his similium, consensu gentium humanius viventium introductum est, stat intra actum primum, nec ad actum secundum, ut loquuntur scholæ, potest pertingere, id est, ad habendi, non ad per se utendi jus pertinet. Nam alienatio et si qua huic sunt similia, in ipsa sui natura includunt actum utentis ratione voluntatis, quæ in talibus existere

by the Civil Law, as we have said (B. II. c. ii. § v.). For the right to take such things is from a permission of Natural Law; not from a command, directing that there shall always be such liberty. Nor does human society require that it should be so. If any one should say that it appears to be a part of *jus gentium* that such a liberty should exist; I reply, that although in any part of the earth this be or should be so received, yet it has not the force of a general compact among nations: but is the Civil Law of several nations distributively, which may be taken away by nations singly. There are several such points which the jurists say are *juris gentium*, in what relates to the division and acquisition of property.

VI. It is to be observed also, if we regard Natural Law alone, that there is no ownership except in a creature endowed with reason. But the *jus gentium* has introduced an assumption, on the ground of common utility, that infants and insane persons can receive and retain ownership, the human race, as it were, performing their parts for them. And in fact many things besides nature may constitute Rights, though nothing can constitute Rights against nature. Therefore this ownership which is thus introduced in favour of infants and the like by the custom of civilized nations, stops at the *primus actus*, the potential fact

non potest. Quo non male referas illud Pauli apostoli, *Gal. iv. 1.* pupillum quanquam rerum paternarum dominum, dum ejus est ætatis, nihil differre a servis, exercitio domini scilicet. De mari cœpimus supra aliquid dicere, quod nunc absolvendum est.

VII. Flumina occupari potuerunt, quanquam nec supra nec infra includuntur territorio, sed cum aqua superiori et cum inferiori, aut cum mari cohærent. Sufficit enim quod major pars, id est, latera clausa sunt ripis, et quod comparatione terrarum exiguum quid est flumen.

VIII. Ad hoc exemplum videtur et mare occupari potuisse ab eo, qui terras ad latus utrumque possideat, etiamsi aut supra pateat ut sinus, aut supra et infra ut fretum, dummodo non ita magna sit pars maris, ut non cum terris comparata portio earum videri possit. Et quod uni populo aut regi licet, idem licere videtur et duobus aut tribus, si pariter mare intersitum occupare voluerint: nam sic flumina, quæ duos populos interluunt, ab utroque occupata sunt, ac deinde divisa.

IX. 1 Fatendum est in partibus cognitis Romano imperio a primis temporibus ad Justinianum usque, juris gentium fuisse, ne mare a populis occuparetur, etiam quod jus piscandi

of having; and does not go on to the *actus secundus*, the operative fact of using. For alienation and similar processes in their very nature include the use of reason, which cannot exist in such agents. To which we may refer, *Gal. iv. 1, the heir, so long as he is a child, &c.*

VII. We have above begun to speak of the sea; we must now finish what we have to say on the subject.

Rivers may be held as by occupation, though neither their upper nor lower extremity be included in the territory; but cohere with superior or inferior water, or with the sea. It is sufficient that the greater part, that is, the sides, are inclosed with banks, and that a river is something small in comparison with the land.

VIII. By this it appears that a portion of the sea also may be occupied by him who possesses the land on each side: although it be open at one end, as a bay, or at both, as a strait; provided it be not such a portion of the sea as is too large to appear part of the land. And what is lawful to one people or king, seems also to be lawful to two or three, if they, in like manner, wish to occupy the sea which lies among their dominions. And thus two rivers which flow between two peoples are occupied by both, and thus are divided.

IX. 1 It must be confessed, however, that in the parts of the

Lib. II. § 1.
D. de Rer.
Div. § 1.
Instit. de
Rer. Div.

attinet. Nec audiendi sunt qui existimant, cum in jure Romano mare omnium commune dicitur, commune civium Romanorum intelligi. Nam primum voces ita sunt universales, ut hanc restrictionem non ferant. Nam quod Latine mare omnium commune dicitur, explicat Theophilus, κοινὸν πάντων ἀνθρώπων. Ulpianus mare omnibus natura patere dixit, et ita omnium esse sicut aër. Celsus, maris communem esse usum omnibus hominibus. Præterea manifeste ⁴ distinguunt jurisconsulti publica populi, in quibus et flumina, ab his communibus. Ita in institutionibus legimus: *Quædam naturali jure communia sunt omnium, quædam publica: Naturali jure communia sunt omnium hæc, aër, aqua profluens, et mare, et per hoc littora maris. Flumina autem omnia et portus publica sunt: et apud Theophil. φυσικῶ μὲν οὖν δικαίῳ κοινὰ πάντων ἀνθρώπων ἐστὶ ταῦτα, ὁ ἀήρ, τὸ ὕδωρ τὸ αἶνναον, θάλασσα. Μοχ: ποταμοὶ δὲ πάντες καὶ λιμένες πουβλικοὶ εἰσι, τοῦτ' ἐστὶ τοῦ δήμου τοῦ Ῥωμαϊκοῦ.*

L. Vendit. 13.
Comm. Præd.
Lib. III. Ne
quid in loco
Publico, § 1.

De Rer. Div.
§ 1.

L. Quod in
littore. D. de
Acq. Rer.
Dom.

2 Sed et ⁴ de littoribus dixit Neratius non ita esse publica, ut quæ in patrimonio sunt populi, sed ut ea, quæ primum a natura prodita sunt, et in nullius adhuc dominium pervene-

⁴ Communia hæc omnium, dicuntur etiam Publica a priscis Ictis. Vide Clariss. Noorr. Probab. Jur. Lib. I. cap. vii. viii. Quoad rem ipsam, vel non satis inter se consensisse, vel non satis accuratas habuisse notiones videntur Veteres illi Sapientes. Sed de eo non est hec agendi locus. J. B.

^c Communia sunt omnium] Michael Attaliates: τινὰ δὲ πάντων εἶναι, οἷον ὁ ἀήρ, τὸ μέν ὕδωρ, ἡ θάλασσα, ὁ αἰγιαλὸς τῆς θαλάσσης. *quædam sunt omnium, ut aër, ut aqua profluens, ut mare. et litus maris.* (Tit. II. Pragm.)

^d De littoribus] In Basilicorum Eclogis Lib. I. tit. I. c. 13. οἱ αἰγιαλοὶ ἐν

earth known to the Roman empire from the earliest times down to Justinian, it was a part of the Law of Nations that the sea could not be occupied by any people, even for purposes of fishery. Nor are they to be attended to who say, that since, in the Roman Law, the sea is called *commune omnium*, common to all, it is to be understood as common to Roman citizens. For, in the first place, the expressions are too general; as in Theophilus, Ulpian, Celsus. [See.] And next, the jurists distinguish these *publica populi*, public property of one people, from things common to all. So in the Institutions and Theophilus. [See.]

2 As to shores of the sea, Neratius said that they are not public as belonging to any one people, but as still in a state of nature, never having come to belong to any, not even any people. This seems to be contradicted by what Celsus says, that the shore within the bounds of

runt, id est, ne populi quidem ullius: cum quo responso pugnare videtur, quod Celsus scripsit: *Littora, in quæ populus Romanus imperium habet, populi Romani esse arbitror: maris autem usum communem omnibus hominibus.* Sed conciliari videntur ita hæc posse, si dicamus Neratium de littore loqui, quatenus usus ejus navigantibus, aut prætervehentibus est necessarius. Celsum vero quatenus ad utilitatem perpetuam assumitur, puta ad ædificium permanens: quod a prætore impetrari solere Pomponius nos docet, ut et jus ædificandi in mari, id est, in parte littori proxima, et quæ littori quasi accensetur.

d. l. littora.
D. Ne quid
in loco publ.

L. Quamvis.
50. D. de Acq.
Dom.

X. 1 Hæc quanquam vera sunt tamen ex instituto non ex naturali ratione provenit, quod mare eo quo diximus sensu occupatum non est, aut occupari jure non potuit. Nam et flumen publicum est, ut scimus, et tamen jus piscandi in diverticulo fluminis occupari a privato potest: sed et de mari dictum a Paulo est, si maris proprium jus ad aliquem pertineat, uti possidetis interdictum ei competere; quoniam ad privatam jam causam pertinet non ad publicam hæc res: utpote cum de jure fruendi agatur, quod ex privata causa contingit, non ex publica: ubi haud dubie de exigua agit maris por-

L. Si Quis-
quam. 7. D.
de Divers.
Temp. Præa.
L. Sane 14.
D. de Injur.
lx. 1.

τῇ πᾶντος ἐξουσίᾳ εἰσι' littora in omnium sunt potestate. Vide et libro LIII. tit. vi.

^a Vocem perpetuam addidi, quæ excidit in omnibus Editionibus, et quam deesse manifesto patet ex oppositione. J. B.

^c Ex instituto] Quo ipso instituto

usi et Angli contra Danos: vide optimum Camdenum in regno Elisabethæ anno c10 lxx.

^f De exigua agit maris portione, quæ in fundum privatum admittitur] Salustius (*Bell. Catil.* c. 13): a privatis compluribus subversos montes, maria constructa. Horatius *Lyricorum* libro II.

the Roman authority belongs to the Roman people; but that the sea is common. The two may be reconciled, if we suppose that Neratius meant the use of the shore as far as it is used by navigators or travellers; but Celsus, so far as it is taken up for some permanent use, as for a building. For this, as Pomponius teaches us, was obtained only by application to the judge, as also the right of building in the sea.

X. 1 Though this is so, yet that the sea, in the sense which we have spoken of, is not occupied, nor can lawfully be occupied, is a result of institution, not of natural reason. For a river is public property, as we know; and yet the right of fishing in a certain bend of the river may belong to a private person by occupation: and Paulus pronounced, that if any one could have property in the sea, he might obtain a sentence of the court in the usual form, *uti possidetis*, since the case would be a private, not a public one; but in this he speaks, doubt-

L. Injur.
circa fin. 13.
§ 7 D. de
Injur.

tione, quæ in fundum privatum admittitur: quod ²a Lucullo et aliis factum legimus. Valerius Maximus de C. Sergio Orata: *peculiaria sibi maria excogitavit, æstuariis interceptendo fluctus*. Sed idem postea contra veterum Jurisconsultorum responsa ad ^h *πρόθυρα*, id est, vestibula in Bosphoro Thracico produxit Leo Imperator, ut ea quoque septis quibusdam, quas *ἐπὶ τοὺς* vocabant, includi et privatim vindicari possent.

2 Quod si privatorum fundis aliquid maris potest accedere, quatenus inclusum nempe est, et ita exiguum, ut fundi portio censi possit, nec quo minus id fiat repugnat jus nature; quidni et portio maris inclusa littoribus ejus fiat populi, eorumve populorum, cujus quorumve sunt littora, dum ea pars maris ad territorium comparata non major sit quam diverticulum maris comparatum ad magnitudinem fundi privati?

carmine xviii. (vers. 20):

Marisque Ballis obstrepentis urges
Summove litora:

Et libro III. carmine i. (vers. 33):

Contracta places æquora sentiunt
Jactis in altum molibus —

Velleius Paterculus (Lib. II. c. 33):

*Injectas moles mari et receptum suffossis
molibus mare*. Seneca in excerptis
controversiarum libro v. contr. v. v.
Maria submoventur projectis molibus.
Plinius de Terra Lib. II. c. lxiii. *Ut
freta admittamus, eroditur aquis*. Stagna
stupenda admisso mari dixit Lampridius

Severo. (Cap. 26). Cassiodorus IX.

c. vi. *Quantis ibi molibus marini ter-
mini decenter invasi sunt, quantis in vis-
ceribus æquoris terre promota est?*
Tibullus:

Olandit et indomitum moles mare, lentus ut
intra

Negligat hibernas placis abesse minas.

(Lib. II. *Eclog.* vi. 27.) De talibus pla-
cinis maritimis agit Plinius libro xxxi.
cap. vi. Columella *Rei Rusticæ* libro
VIII. c. xvi. et xvii. ubi hoc inter alia:
*lautitias locupletum maria ipsa Neptu-
minus clausisse*. Similia habet Am-

less, of a small part of the sea, such as can be taken into private grounds, as was done by Lucullus and others. C. Sergius Orata *made seas of his own by shutting up estuaries*, as Valerius says. And this authority was used by Leo the Emperor, for appropriating the entrance of the Bosphorus by shutting it with piers.

2 Since a portion of the sea may become part of a private estate, namely, if it be included in the estate, and so small as to seem part of it, and if Natural Law does not prohibit this; why should not a portion of the sea included within the territory of a people or of several peoples be the property of those whose the shores are? provided that the size of that portion of the sea compared with the territory be not larger than the creek of the sea compared with the estate. And it is not a reason against this, that the sea is not included on all sides, as we may understand by the example of a river, and of the sea admitted into the heart of a city.

Nec ob stare quod mare non undique includatur, exemplo fluminis, intelligi potest, et exemplo maris ad villam admissi.

3 Sed multa, quæ natura permittit, jus gentium ex communi quodam consensu potuit prohibere. Quare quibus in locis tale jus gentium viguit, neque communi consensu sublatum est, maris portio quamvis exigua, et maxima sui parte inclusa littoribus, in jus proprium populi alicujus non concedet.

XI. Verum notandum etiam, si quibus in locis jus illud gentium de mari receptum non esset, aut sublatum, tamen ex eo solo, quod terras populus occupavit, mare occupatum colligi non posse: nec animi actum sufficere, sed actu externo esse opus, unde occupatio possit intelligi. Deinde vero si deservatur possessio ex occupatione nata, jam mare redire ad veterem naturam, id est, ad usum communem: quod de inædificato

brosius Hexæmero v. c. x. et de *Nabulhe* cap. iii. et *Martialis* aliquot locis. [Exempli gratia, libro x. *Epigr.* xxx. vers. 19, et seqq.]

§ *A Lucullo*] Varro de eo: *Ad Neapolim L. Lucullus, posteaquam perfodisset montem, et maritima flumina immiseret in piscinas, quæ reciproca fuerent, ipse Neptuno non cederet eo piscatu.* (*De Re Rust.* lib. iii. cap. 17). *Plutarchus* ejus vita: *καὶ τροχὸς θαλάσσης καὶ διαδρομὰς ἰχθυοφόρους τοῖς οἰκητηρίοις περιέλισσοντες, καὶ διαίτας ἐνάλιον κτιζόντες.* (pag. 518 c.) *Cum*

ipse maris alveos et plenos piscibus euripos villis suis circumdaret, inque ipso mari cænacula fabricaret. *Plinius* libro ix. c. liv. *Lucullus exciso monte juxta Neapolim, majore impendio quam villam edificaverat, euripum et maria admisit: qua de causa Magnus Pompeius Xerxem logatum eum appellabat.*

ἢ *Πρόθυρα*] Vide *Leonis Novellas* LVII. CII. CIII. CIV. *Attaliam* pragmaticorum tit. xcv. *Harmoniopolum* lib. ii. tit. 1. § *περὶ προθύρων.* Vide et summum virum *Jacobum Cujacium* *Observat.* xiv. 1.

3 But many things which are permitted by nature, the Law of Nations, by a bond of common consent, has prohibited. Wherefore in those places in which such a Law of Nations is in force, and is not suspended by common consent, any portion of the sea, even though small and mostly included by shores, is not the property of any people.

XI. It is further to be noted, that since, in those places in which that Law of Nations concerning the sea is not received, or is abolished, it is not to be inferred from the mere occupation of the land, that the sea is occupied: so also, that a mere mental act does not suffice for the occupation of the sea; but that there is need of some external act [as the presence of ships] by which the occupation may be understood to take place. And again, that if the possession which arose from occupation be given up by desertion, the sea forthwith returns to a state of nature; that is, to community of use; which was declared by *Papinian* to be the law respecting a shore not built on, and a fishery in a river.

L. Præscr.
43. D. de
Usurp. et
Uic.

littore respondit Papinianus, et de piscatione in fluminis diverticulo.

XII. Illud certum est, etiam qui mare occupaverit navigationem impedire non posse inermem et innoxiam, quando nec per terram talis transitus prohiberi potest, qui et minus esse solet necessarius et magis noxius.

¹ Imperium in maris partem] Philo de [plantat. Noæ, p. 223 z. Ed. Paris. ubi agit] de Regibus: καὶ τὰ ἀπειρα πληθεὶ καὶ μεγέθει πελάγη προσεκτίσαντο· etiam maria numero infinita, immensa magnitudine, ad terras adiacere. Lycophron [pag. 84, vers. 4. Edit. Meurs.]:

Τῆς καὶ θαλάσσης σκῆπτρα καὶ μοναρχίαν·
Terre marisque sceptris, regnorumque opes.
[Habebunt scil. Romani] Virgilius (Georg. I. 31):

Toque sibi generum Tethys emat omnibus undis.
Julius Firmicus (Mathes. Lib. VI. c. 1):
maris ac terræ dominia possidentes.
Nonnus (Dionys. Lib. XLIII. pag. 1106, vers. 14. Ed. Wech.):

Βερόν κράτος ἴσχε θαλάσσης.
Beroe pelagus ditione tenebat.

Termini regnorum Suetiæ in medio freti Ore sunt. Johannes Magnus in Archiepiscopis Upsalensibus cap. xv. De Tyro Curtius (Lib. IV. c. 4): Mare non vicinum modo, sed quodcumque classes ejus adierunt, ditiosis suæ fecit. Unde proverbium: Tyria maria apud Festum. Isocrates de Lacedæmoniis et Atheniensibus (In Panath. p. 243 c. Ed. Steph.): συνέβη ἑκατέραν κυρίαν γενέσθαι τῆς κατὰ θάλατταν· ἣν ὀπότεροι ἂν κατάσχων, ἰππηκόους ἔχουσι τὰς πλείστας τῶν πόλεων· Sic evenit, ut civitas utraque terram adipisceretur eam, quæ mari ab ipsis possesso adjaceret, plurimasque urbes haberet sibi obsequentes. Demo-

sthenes de Lacedæmoniis in Philippica III. (pag. 49 c.) θαλάσσης ἄρχον καὶ γῆς ἀπάσης· Et mare omne et terras tenebant. Scriptor vitæ Timothei: quo facto Lacedæmonii de diuturna contentione destiterunt, et sua sponte Atheniensibus imperii maritimi principatum concesserunt. (Corn. Nepos c. 2.) Scriptor orationis de Haloneso, quæ est inter Demosthenicas, de Philippo loquens Macedone: οὐδὲν ἄλλο ἢ τοῦτο ἀξίωσιν ὑφ' ὑμῶν εἰς τὴν θάλασσαν κατασταθῆναι, καὶ ὁμολογῆσαι ὑμᾶς εἰς οὐκ ἄνουν Φιλίππου οὐδὲ τὴν ἐν τῇ θαλάσσει φυλακὴν δύνασθαι εἶναι φυλάττειν· (Pag. 31 v): Nihil ille querit aliud, quam a nobis in possessione constitui maris, et a nobis confessionem exprimere, nos absque ipso nec maris custodiam posse retinere. Julianus Imperator de Alexandro, molitum eum esse bellum hoc animo: ὅπως γῆς τε ἀπάσης καὶ θαλάττης κύριοι γένοιτο· ut terræ marisque totius dominus fieret. (Orat. III. p. 107 c. Edit. Spanh.) Hujus successor Antiochus Epiphanes apud Gorioniden: Nonne terra et mare mea sunt? De alio ejusdem successore Ptolemæo Theocritus (Idyll. XVII. 76):

Πολλὰς δὲ κράτει γαίας, πολλὰς δὲ θαλάσσας.

Lateque imperitat terris, lateque profundo.

Item (Ibid. vers. 91):

θάλασσα δὲ πᾶσα καὶ αἶα,
καὶ ποταμοὶ κελδοῦντες ἀνίσσονται Προ-
λεμαίῳ.

XII. This is certain, that even he who holds the sea by occupation cannot prevent an unarmed and harmless navigation upon it; since even a transit of this character over land cannot be prohibited, which nevertheless is both less necessary, and more noxious*.

* The right of transit by land, which is here described as "more noxious," and used as an argument, was proved by assuming it to be absolutely innoxious. See B. II. c. II. § XIII. W. W.

XIII. 1 Ut autem solum imperium in maris partem sine alia proprietate occupetur, facilius potuit procedere: neque arbitror jus illud gentium, de quo diximus, obstare. Argivi olim cum Atheniensibus expostularunt, quod suo mari Spartanos Argivorum hostes transire sivissent: quasi violato fœdere, quo cautum erat, ne alter populus hostes alterius

Bosius Tit. de Aquat. n. 36. allegans Bal. Cepoll. et alios. Vide L. Unicam c. de Class. Lib. vi. Thucyd. v. 56.

omnis tellusque fretumque

Altiæque amnes sub rege jacent Ptolemæo.

Tempus est ad Romanos veniamus. Scipioni majori sic Annibal in Livio (Lib. xxx. c. 30): *Carthaginenses inclusi Africa littoribus, vos, quando Diis ita placuit, externa etiam terra marique videamus regere imperia.* De minore Scipione Claudianus (*De sec. Cons. Stilicon.* Præf. vers. 7. 8):

patræ primo cum manibus ultor
Subdaret Hispanum legibus Oceanum.

Itaque mare internum passim suum vocant Romani, Sallustius, Florus, Mela, alii. Sed plus adjicit Dionysius Halicarnassensis (*Antiq. Rom. Lib. 1. c. 3*): *πάσης κρατεῖ θαλάσσης οὐ μόνον τῆς ἐντὸς Ἑρακλείων σπηλαίων, ἀλλὰ καὶ τῆς ἁκσαντίτιδος ὅση πλείσθαι μὴ δδύναντός ἐστι· Populus Romanus omni mari imperat, non modo ei, quod inter columnas est Hercules, sed et oceani, in quantum navigatur.* De hisdem Dion Cassius: *πάσης σχεδὸν βασιλεύοντες γῆς καὶ θαλάσσης· omni ferme imperant terræ marique.* Appianus in præfatione describens Romani imperii magnitudinem, sub eo ponit mare Euxinum, Propontidem, Hellespontum, Ægæum, Pamphylum, et Ægyptium mare. Pompeio datum imperium in omne id mare, quod intra Hercules est columnas: ita Plutarchus et Appianus. Philo in *Flaccum* (pag. 980 B): *ἀφ' οὗ τὴν ἡγεμονίαν ὁ Σεβαστὸς οἶκος ἀνήψατο γῆς καὶ θαλάσσης· ex quo Cæsarium domus*

terræ marisque imperium adepta est. De Augusto Ovidius (Metam. xv. 831): pontus quoque serviet illi.

Inscriptio in ejus honorem [Apud Gruter. p. 194. num. 4. Edit. prim.]: *Orbe terra et mari pacato. Augustus Janum Quirinum terra marique pace parta ter clausit, teste Suetonio (Aug. c. 22): qui de eodem (cap. 49); Classen Misani et alteram Ravennæ ad tutelam superi et inferi maris collocavit.* Ad Tiberium Valerius Maximus (*Præfat. p. 2*): *Penes te hominum Deorumque consensus maris et terræ regimen esse voluit.* De eodem Philo (*De Legat. ad Caium*, pag. 1012 C): *γῆς καὶ θαλάσσης ἀναψάμενον κατὰ κράτος· qui imperio terram ac mare complectebatur.* Idem de Calo Tiberii successore: *Γάδιον μετὰ τὴν Τιβερίου τελευτὴν παρεληφότα τὴν ἡγεμονίαν πάσης γῆς καὶ θαλάττης.* (Ibid. pag. 993 C.) *Caium qui post mortem Tiberii imperium omne terræ marisque suscepit.* Vespasianum Josephus vocat, (*De Bell. Jud. Lib. III. cap. 8. § 9. Ed. Hudson*) *δεσπότην καὶ γῆς καὶ θαλάσσης· terræ marisque dominum*: idem jus Antonino multis in locis Aristides tribuit. Procopius Imperatoris statuas effictas narrat orbem tenentes, *ὅτι γῇ τε αὐτῷ καὶ θαλάσσεια δεδούλωται· quod ei subiecta esset terra et mare.* (*De Ædific. Justin. cap. 2. de Augustæ*). Nicetas Patricius Adriatici littoris servator memoratur in literis Ludovici II. (Apud GOLDAST. *Constit. Imperial. Tom. 1.*

XIII. 1 The empire of the sea, claimed over a portion of it without any other property [on which it depends] might easily proceed from such claims as we have spoken of, nor do I conceive that the Law of Nations, of which we have spoken, would stand in the way. It has often been asserted and conceded; thus the Argives expostulated with the Athenians for allowing the Spartans to pass over the sea, whereas

Idem, iv. 118. *sineret ire διὰ τῆς αὐτῶν, per sui imperii loca.* Et in induciis annalibus belli Peloponnesiaci permittitur Megarensibus navigare mari quod ad ipsorum sociorumque terram pertineat, τῇ θαλάσῃ ὅσα ἂν κατὰ τὴν αὐτῶν καὶ κατὰ τὴν ξυμμαχίαν. Sic θάλασσαν τὴν τῶν Ῥωμαίων πᾶσαν, mare omne quod Romani est imperii, dixit Dion Cassius libro XLII. Themistius de Romano Imperatore : τὴν γῆν καὶ θάλασσαν ὑπὲρ αὐτῶν ἔχων : *habens sibi subditam terram et mare.* Oppianus ad Imperatorem. [*Halieut.* III. 4.]

σοῖς μὲν γὰρ ὑπὸ σκῆπτροισι θάλασσα

ἐδέεται.

tuis etenim sub legibus sequor

Volvitar.

p. 415 D. Et Dion Prusæensis, in altera ad Tarsenses, multa ei civitati ab Augusto ait concessa, inter alia ἐξουσίαν τοῦ ποταμοῦ, καὶ τῆς θαλάττης τῆς κατ' αὐτὴν *jus in amnem Cydnium et proximam maris partem* : Et apud Virgilium legimus (*Æn.* I. 236) :

Qui mare, qui terras omni dititione tenerent.

pag. 118). Constantinus Monomachus in historia dicitur γῆς καὶ θαλάσσης κύριος καὶ δεσπότης : *terræ marisque Imperator ac dominus.* Et inter themata, id est, provincias Romani imperii, ponitur mare Ægæum : (apud Constantin. Porphyrogen. Lib. I. Them. 17). Francos mari ad Massiliam et circum imperasse narrat Procopius *Gothicorum* III. (cap. 33). De jure Venetæ reipublicæ vide Parutam libro VII. et specialem historiam de Uscochis. Addi his possunt jurisconsulti recentiores ad c. ubi periculum, 3. de electione in VI. Bartolus, Angelus, Felinus in c. ad liberandum, 17. in principio : de Judmis.

Baldus ad titulum digestorum de rerum divisione col. 2. Afflictus in tit. quæ sint regalia. Cacheranus decisione Pedemontana 155. num. 4. ubi ex Baldo dicit totum mundum hoc jure uti. Albericus Gentilis advocacionis Hispanicæ I. 8. [In loco, quem Auctor adfert, tamquam ex Dione Cassio, videtur memoris lapsus hunc Scriptorem landasse pro THEMISTIO, apud quem saltem totidem verbis reperies verba adducta, *Orat.* V. pag. 137, in fin. *Edit. Petav.* 1618].

⁶ Non potest heic distingui imperium a dominio ; ut in Notis nostris Gallicis, Deo dante, ostendemus. Vide interim, circa totam hanc questionem de Domi-

the treaty was that neither party should allow the enemies of the other to pass through their domain.

And in the truce, in the Peloponnesian war, the Megareans are permitted to navigate the sea contiguous to their and their allies' shores. So the sea is spoken of as part of the Roman empire, by Dio Cassius, Themistius, Appian, Dio Prusæensis, Virgil, Gellius. So the Massilians and the Sinopians.

2 The empire of a portion of the sea is, it would seem, acquired in the same way as other lordship ; that is, as above stated, as belong-

Apud Gellium: *Fluminum quæ in mare, qua imperium Romanum est, fluunt.* Notat Strabo Massilienses multa cepisse spolia cum præliis navalibus vicissent τὸν ἀμφισβητοῦντα τῆς θαλάσσης ἀδίκως eos, qui injuste de mari controversiam moverent. Idem Sinopen ait impetrasse mari in Cyaneas.

Lib. x. 7.

Lib. iv. p. 180.

Lib. xii. p. 545.

2 Videtur autem imperium in maris portionem eadem ratione acquiri, qua imperia alia, id est, ut supra diximus, ratione personarum et ratione territorii. Ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat: ratione territorii, quatenus ex terra cogi possunt, qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperirentur.

XIV. Quare nec contra jus naturæ aut gentium faciet, qui recepto in se onere tuendæ navigationis juvandæque per ignes nocturnos et brevium signa, vectigal æquum imposuerit navigantibus, quale fuit Romanum vectigal Erythræum, ob sumtus exercitus maritimi adversus piraticas excursiones: et quod in ponto Byzantini exigebant διαγώγιον, et quod jam olim Athenienses occupata Chrysopoli exegerant in ponto eo-

Plinius xix.

Strabo xvii. p. 798.

nio Maris, Dissertationem singularem Ampliss. BYNCKERSHOECKII; et quæ diximus ad PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. iv. cap. v. J. B.

^k Vectigal æquum] Rhodii olim portorium de insulis exegere, etiam de Pharo apud Alexandriam, teste Ammiano Lib. xxii. (cap. 16. p. 373). De Venetis, qui in Gallia, Cæsar: *In magno impetu maris atque aperto, paucis portubus interjectis quos tenent ipsi, omnes fere qui eodem mari uti consueverunt, habent vectigales.* (Bell. Gall. iii. 8). Florus de Romanis: *Pudebat nobilem populum ablato mari, rapto insulis, dare*

tributa quæ jubere consueverat. (Lib. ii. c. 6). Plinius vi. c. xxii. Annii Plocami meminit, qui maris rubri vectigal a fisco redemerat: idem capite sequenti de mari agens, quo in Indiam navigatur: *Omnes annis navigatur sagittariorum cohortibus impositis. Etenim pirata maxime infestant.* Disputationes egregias de modo vectigalis vide in Elisabetha Camdeni Anno cIo Ic lxxxii. et cIo lcc ii.

^l Qui in ora libri heic laudatur, Plinius, nil tale habet; nisi quod refertur ab auctore, in Nota, de Annio Plocamo, ex Lib. vi. 22. J. B.

¹ Quod in ponto Byzantini exigebant]

ing to a person, or as belonging to a territory: belonging to a person, when he has a fleet which commands that part of the sea; belonging to a territory, in so far as those who sail in that part of the sea can be compelled from the shore as if they were on land.

XIV. Hence he does nothing contrary to the Law of Nature and Nations, who, undertaking the care of assisting navigation by providing lighthouses and buoying sand-banks, imposes an equitable tax upon navigators; like the Roman Erythræan tax to meet the expense of the expedition against the pirates; and the passage dues which were

Lib. iv. 44.
p. 369 A, B.

dem, memorante utrumque Polybio: et quod in Hellesponto olim Athenienses eosdem exegisse ostendit ^mDemosthenes in Leptinen, suo autem tempore Romanos Imperatores in arcana historia memorat Procopius.

Philostr. de
Vita Apoll.
lib. II.
Plut. Cim.
p. 487 A.
Diod. xi. 61.
Aristid. in
Panath. p.
294. Tom. I.

XV. 1 Inveniuntur exempla fœderum, quibus populus alter alteri populo se obstringit, ne ultra certum terminum naviget. Sic inter reges accolæ rubri maris et Ægyptios convenerat olim, ne Ægyptii in id mare venirent ulla navi longa, oneraria non plus una. Sic inter Athenienses et Persas ⁿCimonis ætate placuerat, ne qua navis Medica armata intra Cyaneas et Chelidonia navigaret; intra Cyaneas et

Meminit Byzantini vectigalis Herodianus Severo. (Lib. III. c. i.) Procopius, tum in vulgata tum in arcana historia, (cap. 25) etiam veteris vectigalis in Hellesponto meminit, novi autem ad fauces maris Euxini et in freto Byzantino. Byzantini exactionem fuisse ad ædem Blachernianam, Hellespontiacum Abydi docet Theophanes. Abydi illud δεκατεν-τήριον, id est, vectigalarium decimæ, vocat Agathias libro v. (cap. 5) minuit id Irene. Immanuel Comnenus Imperator monasteriis aliquibus concessit θαλάσσια δίκαια, obventiones e mari. Docet Balsamo in Concilii Chalcedonensis canonem IV. et Synodi VII. canonem XII.

^m Demosthenes in Leptinen] Idem ibidem accepta Byzantio dominos maris factos ait Athenienses. Ulpianus Scholastes solutam ibi ait decimam. (Pag. 134 c. Tom. II. Ed. Basil. 1572).

ⁿ Cimonis ætate] Hæc est illa εἰρήνη

περιβόητος, nobilissima pax, Plutarcho, qua et hoc convenerat, ut Persæ a mari tantum spatii abstererent quantum ferret equi cursus, id est, XL. stadia. Meminit et Isocrates Panathenæico. [Locus est pag. 244 z. Ed. H. Steph. Sed Auctor noster dixit *quadraginta stadia*, pro *quadringentis*: nam totidem continebat ἵππου δρόμος, ut exponitur a Plutarcho, pag. 491. τετρακοσίων σταδίων ἑνός. Et res ipsa clamat: quadraginta enim stadia conficiunt tantum unum *milliare* vulgare, seu ter mille passuum Geometricorum, cum duabus tertiis: quis autem Equus, per unum diem, non longe majus spatium itineris absolveret? Vide DEMOSTHEN. *Orat. de Fals. Legat.* pag. 273 A. DIOD. SICUL. Lib. XII. cap. 4. et ARISTID. *Orat. in laudem Rom.* p. 349. Tom. I. Aliud est ἱππικόν, de quo alibi PLUTARCHUS, *Vit. Solon.* pag. 91 c. nimirum spatium, quod emetitur Equus in Agonibus, et

levied by the Byzantines in their sea; and those which the Athenians levied in the same sea when they occupied Chrysopolis: [See Polybius.] and what the Athenians formerly had levied in the Hellespont, as Demosthenes shews; and the Roman emperors, as Procopius mentions, in his time.

XV. 1 There are examples of treaties by which one people bound itself to another not to navigate beyond certain boundaries. Thus the kings of the region on the Red Sea, and the Egyptians, had a convention that the Egyptians should not come upon that sea with any ship of war, nor with more than one merchant-vessel. So the Athenians and Persians at the time of Cimon agreed that no armed Median ship should sail within the Cyanean and Chelidonian islands;

Phaselidem post prælium ad Salaminem: in annalibus induciis belli Peloponnesiaci, ne Lacedæmonii navigarent longis navibus, sed aliis navigiis, quæ ferrent ponderis non amplius quingentis talentis: et primo fœdere, quod statim ab exactis regibus °Romani cum Carthaginiensibus fecerant, convenerant, ne Romani Romanorumve socii ultra Pulchrum promontorium navigarent, extra quam si tempestatis aut hostium vi compulsi essent: qui vi compulsi advenissent, nihil sumerent præter necessaria, et intra diem quintum abscederent. Et ⁱⁿ secundo fœdere, ne Romani ultra Pulchrum promontorium, Mastiam et Tarseium prædas agerent mercatumve irent. In pace cum Illyriis, ne Illyrii ultra Lissum ^{pluribus quam} duobus lembis iisque inermibus navigarent. In pace cum An-

Thucyd. iv. 118.

Polyb. iii. 22.

App. III. p. 760.

quatuor erat stadiorum, ut ipse statim exponit. Hæc duo tamen confudit J. CASPAR EISENSCHMID, in libro ceteroquin utilissimo *De Ponderibus et Mensuris Veterum* &c. p. 113. J. B.]

° Romani cum Carthaginiensibus] Servius ad illud iv. *Æneidos*:

Littora littoribus contraria.

Quia in fœdere cautum fuit, ut neque Romani ad littora Carthaginiensium accederent, neque Carthaginenses ad littora Romanorum. Simile fœdus Romanorum cum Tarentinis: μη πλεῖν Ῥωμαίων πρόσω Λακινίας ἀκρας ne Romani ultra promontorium Lacinium navigarent; est hoc in excerptis ad legationes ex Appiano. [Excerpt. Fulvii Ursini, num. 5. pag. 444. init.] Mersos a Pœnis externos, qui in Sardininiam vel ultra columnas navigarent, tradit Strabo libro xvii.

¶ In secundo fœdere] Erat et hoc in eo, ne Romani in Africam aut Sardi-

niam appellerent nisi commeatus accipiendi aut naves reficiendi causa. Post bellum Punicum tertium castigatus Senatus Carthaginensis, quod contra fœdus exercitum et navalem materiam haberet. Testis Livius *Epit. Lib. xlviii. et xlix.* Simile est quod Sultanus Ægypti, pacto cum Græcis facto, impetravit, ut ei semel anno duas naves trans Bosphorum mittere liceret. Est id apud Gregoram libro iv. Antiochi olim pax et hoc continebat, ne is armatas naves haberet plures xii. Appianus *Syriaco.* (pag. 112. *Ed. Steph.*) Naves armatæ Adriaticum sinum ingredi per Venetos vetantur ex pactis. Vide Thuanum libro lxxx. in anno cIo lO lxxxiv.

° Reposui *Lissum*, pro *Lessum*, quod habent omnes Editiones. Nulla est urbs *Lessus*: et ἔξω τοῦ Λισσοῦ ait POLYBIUS, *Hist. Lib. ii. cap. 12.* unde hæc fœderis leges sumsit Auctor noster, quamquam in ora libri solum Appia-

and after the battle of Salamis, within the Cyaneans and Phaselis. In the truce of the Peloponnesian war, it was agreed that the Lacedæmonians should not send to sea ships of war, but only merchant-ships of not above 500 talents burthen. In the First Treaty of the Romans with the Carthaginians, it was agreed that the Romans and their allies should not navigate beyond Cape Fair (*Pulchrum Promontorium*), except compelled by tempest or hostile force; and that those who had come under such compulsion should only take necessities, and should depart within five days: and in the Second Treaty it was agreed that the Romans should not plunder nor traffic beyond Cape

Liv. xxxviii
38.

tiocho, ne citra Calycadnum et Sarpedonem promontoria navigaret, extra naves quæ stipendium, legatos, aut obsides portarent.

L. Venditor.
13. D. Comp.

2 Sed hæc non docent occupationem maris, aut juris navigandi. Possunt enim ut singuli, ita et populi pactis, non tantum de jure quod proprie sibi competit, sed et de eo quod cum omnibus hominibus commune habent, in gratiam ejus cujus id interest decedere: quod cum fit, dicendum est quod dixit Ulpianus in ea facti specie, qua fundus erat venditus hac lege, ne contra venditorem piscatio thynnaria exerceretur, mari servitutem imponi non potuisse, sed bonam fidem contractus exposcere, ut lex venditionis servetur. Itaque personæ possidentium et in jus eorum succedentium obligari.

Jul. Frontin.
De Agror.
Quaest. p. 38.

XVI. 1 Frequens est inter vicinos populos contentio, quoties flumen cursum mutavit, an simul et imperii terminus mutetur, et an quæ flumen adjecit, eis cedant quibus adjecta sunt: quæ controversiæ ex naturæ et modo acquisitionis definiendæ sunt. Docent nos mensores tria esse agrorum genera:

num indicet, qui paullum alio modo eas refert. Sic in præcedentibus edidi *Mastiam*, pro *Massiam*, quod perperam legitur in omnibus Editionibus. Ceterum de veteribus illis urbibus *Mastia* et *Tarseio*, quas silentio prætermittit CELLARIUS in *Geographia Antiqua*, vide BOCHARTUM, *Phaleg*. Lib. III. cap. 7. J. B.

¶ *Mensura comprehensum*] Exem-

plum vide apud Servium ad eologam ix. [Sed agitur ibi de agris limitatis. Vide ad vers. 7 et 28. J. B.]

¶ *Montes*] Tacitus de Germania: a Sarmatis Dacisque mutuo metu aut montibus separatur, c. 1. Plinius, libro xxxvi. *Evehimus ea quæ separandis gentibus pro terminis constituta erant*, de Alpibus loquens. [Locus est cap. 1. ubi suspicio pro *Evehimus*, legendum

Fair, Mastia, and Tarseium. In the peace with the Illyrians it was agreed that they should not navigate beyond Lissus with more than two barks, and those unarmed: in the peace with Antiochus, that he should not navigate beyond the promontories of Calycadnus and Sarpedon (in Cilicia), except with the ships which carried his subsidy, ambassadors, or hostages.

2 But these examples do not prove possession of the sea, or of the right of navigating, by occupation. For peoples as well as individuals may, by compact, concede to another not only the Rights which are theirs specially, but also those which they have in common with all men: and when this is done, we may say, what Ulpian said when an estate was sold on condition that the purchaser should not carry on a thunny fishery to the prejudice of the seller;—namely, that there could not be a servitude over the sea, but that the *bona fides* of the contract required that the rule of the sale should be observed; and

divisum, et assignatum, quem limitatum vocat Florentinus jurisconsultus, quia manufactos limites pro finibus habet; assignatum per universitatem, sive ¹mensura comprehensum, puta per centurias ac jugera; et arcifinium, qui inde dictus, docente Varrone, quod fines habeat arcendis hostibus idoneos, id est naturales: ut sunt flumina et ²montes. Hos occupatorios dicit Aggenus Urbicus, quia plerumque tales sunt agri, qui aut eo quod vacui sunt, aut etiam bello occupantur. In duobus primis agrorum generibus etiamsi flumen cursum mutet, nihil de territorio mutatur: et si quid alluvio adjecit, id occupantium imperio accedit.

L. in Agris Limitatis, 16. D. de Acq. Rer. Dom.

Apud. Front. ubi supra.

p. 45.

2 In arcifiniis ³flumen mutato paulatim cursu mutat et territorii fines, et quicquid flumen parti alteri adjecit, sub ejus imperio est, cui adjectum est: quia scilicet eo animo populus uterque imperium occupasse primitus creditur, ⁴ut flumen sui medietate eos dirimeret, tanquam naturalis terminus. Tacitus dixit: *Certum jam alveo Rhenum, quique terminus esse sufficiat.* Diodorus Siculus, ubi controversiam narrat, quæ

De Morib. Germ. 32. Lib. xii. 89. p. 328.

Evellimus, quæ vox aptissima ad terminos motos significandos. Et de evectone in sequentibus agitur: Navesque marmorum caussa fiunt ac per fluctus... huc illucque portantur juga montium, etc. Tota series orationis mihi videtur favere huic facillimæ emendationi. Peritiores judicent. J. B.]

⁵ *Flumen mutato paulatim cursu]*
Vide Johannem Andrea et alios citatos a Reinkingio libro I. classe V. c. 1.

¹ *Ut flumen sui medietate eos dirimeret]* Exemplum in Vedaso amne apud Marianam libro XXIX. (cap. 23.)

² *Quique terminus esse sufficiat]* Spartianus Adriano (cap. 12): *in plurimis locis, in quibus barbari non fluminibus, sed limitibus dividuntur.* Phasim amnem *σὺνὸπρον*, id est, confinem vocat Constantinus Porphyrogeneta, c. 45.

therefore that the possessors and their successors were under a personal obligation to observe the condition.

XVI. 1 When a river changes its course, a question often arises between neighbouring peoples whether the boundary of the territory also changes, and whether the additions which the river makes to one side belong to the land to which they are added; which controversies are to be solved by regarding the nature and mode of the acquisition.

Those who write concerning land, tell us that there are three kinds, the *limitatus*, which is limited by an artificial boundary; the *assignatus per universitatem*, which is determined by its measured quantity, and the *arcifinius*, which is defined by natural boundaries, as rivers or mountains.* In the two former kinds, if the river changes

* Gronovius says that these distinctions are wrongly given by Grotius, and wrongly applied; but Barbeyrac defends him.

inter Egestanos et Selinuntios fuit, ποταμοῦ, αἰτ, τὴν χάραν ὀρίζοντος, *amne fines discriminante*. Et Xenophon talem annem simpliciter τὸν ὀρίζοντα, id est, *finitorem*, vocat.

Lib. iv. Resp. Cyri, § 1.

Strabo x. p. 468.

3 Narrant veteres Acheloum annem, incerto cursu, modo sectum in partes, modo circumactum obliquo agmine, (unde tauri et serpentis formam induisse dicitur) diu de agro adjacente belli causam Ætolis et Acarnanibus præbuisse, donec eum Hercules aggeribus domuit eoque beneficio Oenei Ætolorum regis filiam in matrimonium impetravit.

L. Propoundedatur, 76. D. de Judic.

XVII. 1 Sed hoc ita demum locum habebit, si non alveum mutaverit amnis. Nam flumen, etiam qua imperia disternit, non consideratur nude qua aqua est; sed qua aqua alveo tali fluens ripisque talibus inclusa. Quare particularum adjectio, decessio, aut talis immutatio, quæ toti speciem veterem relinquet, rem sinit eandem videri. At si totius species simul mutetur, res erit alia: atque ideo sicut interit flumen, quod in loco superiore molibus obstructum est, novumque nascitur facta manu fossa, in quam aqua immittitur: ita ²si deserto alveo veteri alia irruperit flumen, non idem

² Si deserto alveo veteri] Ut Bardarus amnis apud Annam Comnenam, libro i. (cap. 5.)

its course, the territory is not changed, and if any alluvial addition is made to it, it is an accession to the property of the occupier of the land.

2 In land defined by a river, its natural boundary, if the river changes its course gradually, it changes also the boundary of the territory; and whatever the river adds to one side belongs to him to whose land it is added; because each people must be supposed to have settled their claims on the understanding that the river, as a natural terminus, should divide them by a line drawn along its middle. So Tacitus speaks of the Rhine as a boundary, so Diodorus of another river; and Xenophon calls such a river simply the *Horizont*, the boundary.

3 The ancients relate that the Achelous, perpetually changing its course, was the constant cause of war between the Etolians and Acarnanians; and that Hercules confined it within banks, and thus put an end to the quarrel.

XVII. 1 But this is only true if the river has not *at once* changed its channel. For a river, as bounding territories, is not considered simply as water, but as water flowing in a certain channel and bounded by certain banks. And therefore any addition or subtraction of particles which leaves to the whole the same general aspect, allows the thing to be taken for the same. But if the aspect of the whole be

erit quod fuit ante, sed novum vetere extincto: et sicut si exaruisset flumen, imperii terminus maneret medietas alvei, qui proxime fuisset: quia mens ea populorum fuisse censenda est, ut flumine quidem naturaliter dirimi vellent: quod si flumen esse desisset, ut tum teneret quisque quod tenuisset: ita mutato alveo idem observandum erit.

L. 3. § 2. ff.
de Ac. Quot.
et Retiva.

2 In dubio autem imperia, quæ ad flumen pertingunt, arcifinia putanda sunt, quia imperiis distinguendis nihil est aptius quam id quod non facile transitur. Ut autem limitata, aut mensura comprehensa sint, rarius accidit; neque tam ex acquisitione primæva, quam ex aliena concessione.

XVIII. Quamquam vero in dubio, ut diximus, imperia ad medietatem fluminis utrinque pertingunt, fieri tamen potuit, et contigisse alicubi videmus, ut flumen totum parti uni accederet, quia scilicet ripæ alterius imperium serius occupato jam flumine cœpisset: aut quia eum in modum res pactionibus esset definita.

changed at once, it becomes another thing. If a river is dammed up in the upper part, and turned into a new cut made by hand, it ceases to be that river; and in like manner if the river leave its old bed and break its way by a new channel, it is not the same river as before, but a new river, the old one being extinguished. And since, if the river had dried up, the boundary of the territory would remain the middle of the channel as it was just before; so, because the intention of the peoples must be supposed to have been that their lands were to be naturally divided by the river, but that if the river ceased to be, then each should hold what he had held; therefore when the channel is thus changed the same rule must be observed.

2 In doubtful cases, the territories which border on the river are to be supposed to have that for their boundary: because nothing is more suitable for separating the lands of different nations than a river which is not easily crossed.

That national territories are defined by the rules of *ager limitatus** or *ager mensura comprehensus* more rarely happens; and then, not from primeval occupation, but from concession, [or by treaty.]

XVIII. But though in doubtful cases, as we have said, national territory extends to the middle of the river, it may happen, and sometimes does, that the whole of the river belongs to one party; as when the second bank has been taken possession of at a later period, after the first bank and the river had been already occupied; or because the matter was so settled by compact.

* In modern times, national territories have frequently been defined by boundaries entirely artificial, as parallels of latitude, and meridians; of which the map of America affords many examples. W. W.

XIX. 1 Illud quoque observatu non indignum, originariam acquisitionem censendam etiam rerum earum, quæ dominum habuerunt, sed habere desierunt: puta quia derelictæ sunt, aut quia defecerunt domini: nam hæc redierunt in eum statum, in quo primum res fuerant.

2 Sed illud simul notandum est, interdum primas acquisitiones a populo aut populi capite ita factas, ut non tantum imperium, in quo inest jus illud eminens, de quo alibi egimus, sed et privatum plenumque dominium generaliter primum populo, aut ejus capiti quæreretur: atque ut deinde particulatim in privatos ita fieret distributio, ut tamen eorum dominium ab illo priore dominio penderet, si non ut jus vasalli a jure senioris, aut jus emphyteuticarii a jure proprietarii, tamen alio quodam tenuiore modo, ut multæ sunt species juris in rem, quas inter est et jus ejus, qui sub conditione fideicommissum exspectat. Seneca: *Non est argumentum, ideo aliquid tuum non esse, quia vendere non potes, quia consumere, quia mutare in deterius aut melius non potes. Tuum enim est etiam quod sub certa lege tuum est.* Dion Prussæensis Rhodiaca:

p. 325 n.

¹ *Non est argumentum*] Locus est de Beneficiis VII. 12. Idem libro ejusdem argumenti octavo, c. 12, quædam quorundam sub certa conditione sunt. [At vero sunt tantum septem Libri de Beneficiis. Locus est eodem libro et capite, quo ille, cujus verba in textu adferuntur. J. B.]

² Locum forte inveni lib. XII. ubi agitur de ministris sacrorum, quorum Archelaus Pontifex, Rex Comanæ a Pompeio constitutus, dominus erat, ita

tamen ut eos vendere non posset: Καὶ τῶν τῆν πόλιν οἰκούντων ἱεροδούλων κύριος πλὴν τοῦ πικράσκειν. Pag. 558. Ed. Casaub. Paris. J. B.

³ *Ad universitatem aut ad dominum superiorem redit*] Sic ex libro secundo Odysseæ in fine colligas, bona ejus qui sine liberis decederet ad populum pervenisse, et sic interpretatur Eustathius illud Homeri *Iliados* E. (vers. 158):

Χρησται δὲ διὰ κτήσιν δαίμονες.
Partiebantur opes rectores urbis.

XIX. 1 This also is worth observing; that there may be an original acquisition of those things which have had an owner, but have ceased to have one; as being derelict, or because the owners have been removed; for then things return into the state of nature in which they were at first.

2 This also is to be noted; that sometimes the first acquisitions of property are made by a people or its head in such a manner that not only the lordship, including that *jus eminens* of which we have spoken, (B. I. c. iii. § vi;) but that also the private ownership, was acquired at first generally for the people or its head; and then the property was distributed particularly in special lots to private persons, in such a manner that their ownership depended on that former ownership; if

μυρίους γὰρ εὐρήσετε τρόπους καθ' οὓς ἐκάστου τι φαμέν
εἶναι· καὶ πλείστον διαφέρονται· ὧν οὔτε ἀποδόσθαι τι
ἔξεστι τοῖς ἔχουσιν, οὔτε ὅπως ἂν θέλοι χρῆσθαι. *Plurimi
sunt modi, quibus quid cuiusque esse dicitur, et quidem
valde inter se differentes: interdum ut nec vendere, nec pro
arbitrio uti liceat. Apud Strabonem invenio: κύριος ἦν
πλὴν τοῦ πιπράσκειν dominus erat demto vendendi jure.*
Exemplum ejus quod diximus in Germanis ponit Tacitus: *De Morib.
German. 26.*
*Agri pro numero cultorum ab universis occupantur, quos
mos inter se secundum dignationem partiuntur.*

3 Hoc igitur modo cum distributa dominia pendent a dominio generali, si quid domino particulari carere incipit, non fit occupantis, sed ²ad universitatem, aut ad dominum superiorem redit. Cui juri jus simile etiam per legem civilem extra hanc causam, ut jam notare cœpimus, introduci potuit.

Nam *χρησταις* magistratum fuisse dicit qui bona sine liberis decedentium administrabat. Simile aliquid usurpatum olim in regno Mexicano docent nos historici. [In loco ex *Odyssea* Poeta hoc tantum innuit, inter Procos Penelope convenisse, si forte Telemachus interisset, sese bona ejus æquis partibus occupaturos, ut solatii loco id esset illis, quos Penelope, uno electo in virum, exclusura esset; ut optime observavit

Doctissima Matrona Anna T. Fabri. Adeoque inde quod auctor noster colligit, minime inferri potest. Neque certius est, quod de *χρησταις*, post Eustathium, adfirmat. Vocem enim illam interpretantur Pollux et Hesychius non de magistratibus, bona sine liberis decedentium administrantibus, sed de propinquis remotis in hereditatem succedentibus. *J. B.*]

not in the same way as the ownership of a Vassal from that of Seigneur, or the ownership of the tenant-farmer from that of the landlord, yet in some slighter way; as in fact there are many species of ownership: among which is the ownership of a trustee. So Seneca and Dio Prusænsis, Strabo, Tacitus, speak of various ways in which a thing may be mine. [See.]

3 And since private properties thus depend on the general proprietorship, if any portion of property ceases to have a special owner, it does not then become the property of the *occupier*, but reverts to the community, or to the superior lord. And a rule similar to this of Natural Law, might be introduced by Civil Law, without the reason we have given.

CAPUT IV.

DE DERELICTIONE PRÆSUMTA, ET EAM SECUTA OCCUPATIONE, ET QUID AB USUCAPIONE ET PRÆSCRIPTIONE DIFFERAT.

- | | |
|---|--|
| <p>I. <i>Usucapio aut præscriptio propriè dicta cur locum non habeat inter populos diversos, eorumve rectores.</i></p> <p>II. <i>Solere tamen et inter hos allegari longævas possessiones.</i></p> <p>III. <i>Causa inquiritur ex conjecturis humanæ voluntatis: quæ petuntur non ex verbis tantum:</i></p> <p>IV. <i>Sed et ex factis:</i></p> <p>V. <i>Et ex non factis.</i></p> <p>VI. <i>Quomodo tempus adjunctum non possessioni et silentio ad conjecturam juris derelicti valeat.</i></p> <p>VII. <i>Ordinariæ ad talem conjecturam sufficere tempus memoriam excedens, et quale hoc sit.</i></p> <p>VIII. <i>Solutio objectionis, neminem præsumendum suum jactare.</i></p> <p>IX. <i>Videri etiam, seposita con-</i></p> | <p><i>jectura, jure gentium ex immemoriali possessione dominium transferri,</i></p> <p>X. <i>An nondum natis jus auferri hoc modo possit.</i></p> <p>XI. <i>Etiam summæ potestatis jus aut populo aut regi acquiri longæva possessione.</i></p> <p>XII. <i>An leges civiles de usucapione et præscriptione teneant eum, qui summam potestatem habet, cum distinctionibus explicatur.</i></p> <p>XIII. <i>Ea jura, quæ separabiliter aut communicabiliter adhærent summo imperio, usucapione aut præscriptione quaeri et amitti.</i></p> <p>XIV. <i>Refellitur sententia, statuens semper subditis licere se vindicare in libertatem.</i></p> <p>XV. <i>Quæ meræ sunt facultatis nullo tempore amitti: quod explicatur.</i></p> |
|---|--|

I. **G**RAVIS hic difficultas oritur de usucapiendi jure. Namque id jus cum lege civili sit introductum (tempus enim ex suapte natura vim nullam effectricem habet: nihil enim fit a tempore, quamquam non fit in tempore) locum habere non

CHAPTER IV. *Of presumed Dereliction of Property, and the Occupation which follows; and how it differs from Usucaption and Prescription.*

I. Here arises a great difficulty concerning the right of usucaption, [by which a thing long used becomes the property of the possessor.] This Right is introduced by the Civil Law, [not by Natural Law,] for time, of its own nature, has no effective power; for nothing is done by

potest, ut censet Vasquius, inter duos populos liberos, aut reges, populumve liberum et regem: imo ne inter regem quidem et privatum ipsi non subditum, ^{Lib. II. 51. n. 26.} nec inter duos diversorum regum aut populorum subditos: quod verum videtur, nisi quatenus res vel actus tenetur territorii legibus. Atque id si admittimus, sequi videtur maximum incommodum, ut controversiæ de regnis regnorumque finibus nullo unquam tempore extinguantur: quod non tantum ad perturbandos multorum animos et bella serenda pertinet, sed et communi gentium sensui repugnat.

II. Nam et in sacris literis Jephthes regi Ammonitarum ^{Judic. xi. 26.} sibi vendicanti terras inter Arnonem et Jabocum, et ab Arabum desertis ad Jordanem atas, objicit trecentorum annorum possessionem, et ab eo quærit, cur ipse ejusque majores tanto tempore cessaverint? Et Lacones apud Isocratem, tanquam ^{Archid. p. 131 A.} certissimum ^b et apud omnes gentes confessum ponunt, posse-

^a Nec inter duos diversorum regum aut populorum subditos] In lege XII. tabularum erat: *Æterna auctoritas cum hoste esto*, id est, cum peregrino. [Apud CICERON. *De Offic.* lib. I. cap. 12.]

^b Et apud omnes gentes confessum] In hunc sensum disserit pro Gallia dux Nivernensis apud Thuanum libro LIX. in anno 610 ID LXXIV.

time, though everything is done in time. Hence this right, as Vasquius thinks, cannot have place between two free peoples, or kings, or a people and a king; nor even between a king and a private person who is not his subject, nor between the subjects of two different kings or peoples: which appears to be true, except so far as things and acts are governed by the laws of the territory: [for a person in one territory, knowing the laws of another territory as to usucaption, may act accordingly, in questions of right between him and another person in the stranger territory.] Yet if we admit this, there seems to follow this very inconvenient conclusion, that controversies concerning kingdoms and their boundaries are not extinguished by any lapse of time; which not only tends to disturb the minds of many and to perpetuate wars, but is also repugnant to the common sense of mankind.

II. For [the authority of time and usage has been generally acknowledged in disputes on such subjects]. So in Judges xi. 13, 26, when the king of the Ammonites claimed the land from Arnon to Jabbok and Jordan, Joshua said that Israel had dwelt there 300 years; *why therefore did ye not recover them in that time?* And the Lacedæmonians in Isocrates lay it down as a rule most certain, and acknowledged by all nations, that public possessions, as well as private, are so confirmed by length of time that they cannot be taken away; on this ground they

siones publicas, non minus quam privatas, multo tempore ita firmari, ut revelli nequeant: quo jure repellunt eos, qui Messenam repetebant. Verba Græca sunt: τὰς κτήσεις καὶ τὰς ἰδίας καὶ τὰς κοινὰς, ἣν ἐπιγένηται πολὺς χρόνος, κυρίας καὶ πατρῶας ἅπαντες εἶναι νομίζουσι. Idem ¹Isocrates ad Philippum: κάτοχον καὶ βέβαιον τὴν κτήσιν πεποιήκοτος τοῦ χρόνου. Cum firmam stabilemque possessionem longa dies

Liv. xxxii. 10. reddidisset. Hoc jure nisus posterior Philippus T. Quintio dicebat, civitates quas ipse cepisset se liberaturum: quæ sibi traditæ a majoribus essent justa ac hæreditaria possessione,

Liv. xxxv. 16. se non excessurum. Sulpitius contra Antiochum disputans ostendit iniquum esse, ut quod populi Græci in Asia aliquando serviissent, id jus post aliquot sæcula eos asserendi in servitutem faciat. Et historici ^cvetera reposcere vaniloquentiam vocant: μυθικὰς καὶ παλαιὰς ἀποδείξεις Diodorus. Apud

Tacit. Ann. vi. 31.

Cap. 22.

Ciceronem est de Officiis secundo: ^dQuam autem habet æquitatem, ut agrum multis annis aut etiam sæculis ante possessum, qui nullum habuit, habeat, qui autem habuit, amittat?

III. Quid dicemus? Juris effectus qui ab animo pendent, non possunt tamen ad solum animi actum consequi, nisi

¹ Verba illa non sunt Isocratis, sed Dionysii Halicarnass. in *Judicio de Isocrate*, ubi exhibet summam Orationis ipsius Archidami, ex qua locus præcedens. Cap. ix. pag. 155. Tom. II. Ed. Ozon. J. B.

^c *Vetera reposcere*] Τὰ πρὸ Εὐκλείδου

dicunt Græci ex historia Attica: usus inter alios Nicetas, Lib. i. (cap. 9) de Alexio Isaaci fratre, ubi de Henrico agit Imperatore Friderici filio: καὶ ταῦτα δὴ τὰ πρὸ Εὐκλείδου ἀνεπιστάτως ἀνακινῶν ita ille velut ante Euclidem gesta movebat inverecunde. [Vide Liv-

repe those who demand Messena. [See.] So Philip the Second of Macedon told Quintius that he would give up the cities which he had himself taken, but not those which had legitimately descended to him from his ancestors. Sulpitius in Livy, disputing against Antiochus, shews it to be unjust that because the Greeks in Asia had at one time been in subjection, he should make that the ground of an asserted right of reducing them to subjection again after several ages. The historians speak of the claim of ancient possessions as idle talk, mythical stories. See also Cicero.

III. In truth, the effects, as to Rights, which depend on man's will, still do not follow the mere internal act of the mind, except that act be indicated by some external signs. For to assign a jural efficiency to mere acts of the mind, would not be congruous to human nature, which cannot know the acts of the mind, except from outward signs. Yet signs denoting the acts of the mind have never a mathematical, but

is actus signis quibusdam indicatus sit: quia nudis animi actibus efficientiam juris tribuere non fuerat congruum naturæ humanæ, quæ nisi ex signis animi actus cognoscere non potest: qua de causa etiam interni actus meri legibus humanis non subjacent. Signa autem nulla de animi actibus certitudinem habent mathematicam, sed probabilem tantum: nam et verbis eloqui aliud possunt homines, quam quod volunt et sentiunt, et factis simulare. Neque tamen patitur natura humanæ societatis, ut actibus animi sufficienter indicatis nulla sit efficacia: ideo quod sufficienter indicatum est, pro vero habetur adversus eum qui indicavit. Ac de verbis quidem expedita res.

IV. 1 Factis intelligitur derelictum, quod abjicitur, nisi ea sit rei circumstantia, ut temporis causa et requirendi animo abjectum censi debeat. Sic chirographi redditione censetur remissum debitum. Recusari hereditas, inquit Paulus, non tantum verbis, sed etiam re potest, et quovis indicio voluntatis. Sic si is, qui rei alicujus est dominus, sciens cum altero eam rem possidente, tanquam cum domino contrahat, jus suum remisisse merito habebitur: quod cur non et inter reges locum habeat, et populos liberos nihil causæ est.

L. 2. § ult.
D. de Acq.
Rev. Dom.
L. 8. D. ad
Leg. Rhod.
l. 43. § 11. D.
de Furtis.
L. 2. § 1. ff.
de Pactis.
L. 96. D. de
Acq. vel
Omitt. Hered.

OTANUM, in *Cataplo*, T. 1. Ed. Amst. p. 426. et *Hermotim*. p. 563. Locus autem Diodori Siculi, qui postea sine ullo indicio adfertur, exstat Lib. xv. cap. 78. pag. 497. Ed. H. Steph. Et pag. seq. dicitur βίη καὶ δόλιον ejusmodi possessio haberi. J. B.]

^d Quam autem habet æquitatem, ut agrum multis annis aut etiam sæculis ante possessum, qui habuit, amittat? Florus, Lib. III. c. 18. Tamen relictas a majoribus sedes, ætate, quasi jure hereditario possidebant.

only a probable certainty; for men may express in words something different from what they feel and will, and may simulate in their acts. But the nature of human society does not suffer that the acts of the mind, sufficiently indicated, should have no efficacy: therefore what is sufficiently indicated in words, is to be held true, as against him who so indicates it.

This doctrine of the force of words is to be applied to derelicts.

IV. 1 A derelict may also be indicated by the fact; thus, that is a derelict which is thrown away; unless the circumstances of the case be such that it may be supposed to be put away for a time and with the intention of taking it again. Thus a debt is supposed to be remitted by giving up the note of hand which acknowledges it. An inheritance, as Paulus says, may be refused, not only by words, but by deed, and by any indication of will. So if he who is the owner of anything, knowingly contracts with another person in whose possession it is, as

L. 87. D. de
re Jud. et
l. 3. ff. de
off. Prætor.

L. 8. D. de
Acceptil.

L. 44. D. de
Acq. Rer.
Dom.

2 Simile est quod superior concedens inferiori, vel impetrans id facere quod facere licite non potest, nisi lege solvatur, lege solvisse eum intelligitur. Venit enim hoc non ex jure civili, sed ex jure naturali, quo quisque suum potest abdicare, et ex naturali præsumptione, qua voluisse quis creditur quod sufficienter significavit: quo sensu recte accipi potest quod Ulpianus dixit, juris gentium esse acceptilationem.

V. 1 Sub factis autem moraliter veniunt et non facta, considerata cum debitis circumstantiis. Sic qui sciens et præsens tacet, videtur consentire: quod et lex Hebræa agnoscit, Numer. xxx. 4, 5, 11, 12, nisi circumstantiæ ostendant, quominus loquatur, metu eum vel alio casu impediri. Sic amissum censetur id ^ecujus recuperandi spes projicitur, ut porcos a lupo raptos, et quæ naufragio amittimus, nostra esse desinere ait Ulpianus, non statim, sed ubi recipi non possunt, id est, ubi non est cur credatur aliquis animum domini retinere: ubi nulla talis voluntatis indicia exstant. Nam si missi essent qui rem inquirerent, si promissum *μῆνυτρον*, aliud esset judican-

^e Cujus recuperandi spes projicitur] Id *ἔννε* dicitur Hebræis jurisconsultis.

with the owner, he must be held to lose his right: and there is no reason why this should not hold also between kings and peoples.

2 In like manner a superior, making a concession to an inferior, or giving him a command which he cannot lawfully perform, except he be relieved from the tie of the law, is supposed to have loosed that tie. This rule flows, not only from the Civil Law, but from Natural Law, according to which any one may abdicate what is his; and from the natural presumption by which every one is supposed to intend what he has sufficiently indicated. And in this sense may be accepted what Ulpian said, that the acknowledgment in court of the payment of a debt*, is a part of *jus gentium*; (it being really a part of *jus civile*).

V. 1 Among "facts" we must also understand what is left undone, considered with due circumstances. If any one, present and knowing, is silent, he may be assumed to assent; as also the Hebrew Law recognizes, Num. xxx. 4, 5, 11, 12: *If a woman vow a vow, &c.*; except circumstances shew that he was prevented from speaking by fear or other cause. Thus that is supposed to be lost, with regard to which the hope of recovering it is given up; as Ulpian says, that pigs

* Heinec. *Elem. Jur. Civ.* § 1022. Est ergo *acceptilatio* actus legitimus quo interrogatione debitoris et congrua creditoris responsione obligatio per stipulationem contracta dissolvitur. Formula erat *Quod ego tibi promisi, habesne acceptum? Habeo acceptum.*

dum. Sic qui rem suam ab alio teneri scit, nec quicquam contradicit multo tempore, is nisi causa alia manifeste appareat, non videtur id alio fecisse animo, quam quod rem illam in suarum rerum numero esse nolle. Et hoc est quod alicubi dixit Ulpianus, *sedes longo silentio videri pro derelicto a domino habitas. Parum juste* (rescripsit Pius Imperator) *præteritas usuras petis, quas omisisse te longi temporis intervallum indicat: quia eas a debitore tuo, ut gravior apud eum videlicet esses, petendas non putasti.*

L. 15. § 21.
D. de Damno
Infest.
Lib. xvii. § 1.
D. de Usuru.

2 Cui simillimum quid in consuetudine apparet. Nam hæc quoque, semotis legibus civilibus, quæ certo tempore ac modo eam introduci volunt, a populo subdito introduci potest ex eo quod ab imperium habente toleratur: tempus vero, quo illa consuetudo effectum juris accipit, non est definitum, sed arbitrarium, quantum satis est ut concurrat ad significandum consensum.

Thom. 1. 2. q.
97. art. 3.
Suar. Lib.
vii. de Leg.
c. 15.

3 Sed ut ad derelictionem præsumendam valeat silentium duo requiruntur, ut silentium sit scientis, et ut sit libere volen-

carried off by wolves, and goods lost in shipwreck, cease to be ours, not at once, but when they cannot be recovered; that is, when there is no reason to believe that they keep any hold on the mind of the owner; when there is no indication of a purpose of recovering. For if persons have been sent to seek what is lost, or if a reward for finding it is offered, we must judge differently. If any one knows a thing which is his to be held by another, and in the course of a long time says nothing against it, he, except some other reason manifestly appear, must be supposed to have acted with the purpose of no longer having that thing as his. And so Ulpian says, that a house may, by long silence, be understood to be derelict by the owner. And Pius, the Emperor, in a rescript says, You have no right to ask for the interest of your money for the past period, for the length of time shews that you had given it up. You did not require this payment from your debtor, in order to gain favour with him.

2 Similar to this is the case of Custom. For Custom, without referring to the Civil Law, which fixes a certain time and manner for introducing it, may be introduced by a subject people, in virtue of its being tolerated by the Ruler. But the time in which such Custom receives the effect of Law, is not defined, but arbitrary; namely, as much as is necessary to signify the consent of the party.

3 But in order that silence may be valid for the presumption of derelict, two things are required; that it be the silence of a party knowing, and freely willing; for the inaction of a party which is in

tis: nam ¹non agere nescientis, caret effectu; et alia causa cum apparet, cessat conjectura voluntatis.

VI. Ut hæc igitur duo adfuisse censeantur, ²valent et aliæ conjecturæ: sed temporis in utrumque magna vis est. Nam primum fieri vix potest, ut multo tempore res ad aliquem pertinens non aliqua via ad ejus notitiam perveniat, cum multas ejus occasiones subministret tempus. Inter præsentes tamen minus temporis spatium ad hanc conjecturam sufficit, quam inter absentes, etiam seposita lege civili. Sic et incussus semel metus durare quidem nonnihil creditur, sed non perpetuo, cum tempus longum multas occasiones adversus metum sibi consulendi, per se, vel per alios suppetit, etiam exeundo fines ejus qui metuitur, saltem ut protestatio de jure fiat, aut, quod potius est, ad judices aut arbitros provocetur.

*L. Hoc Jure,
S. § ductus, 4.
D. de Aqua
Quot. et Alst.*

VII. Quia vero ³tempus memoriam excedens quasi infinitum est moraliter, ideo ejus temporis silentium ad rei dere-

¹ *Non agere nescientis, caret effectu*] Vide infra hoc libro, cap. xxi. § 11. Adde si vacat *Bart. Soc. consilio cxxxvii. col. 8. Meischnerum decisione Camerali ix. n. 113. Tom. iii.*

² Non tam ex derelictione tacita, cujus præsumptio satis firma ut plurimum non adest, quam ex jure Possessoris bonæ fidei et ipso fine Domini constituti, fundamentum juris istius deducendum esse, ostendimus ad *PURENDORFIUM* nostrum, *De Jure Nat. et Gent.*

in Notis alteri Editioni adjectis, Lib. iv. cap. xii. § 8. Totum illud Caput in hanc rem conferri potest. *J. B.*

³ *Tempus memoriam excedens*] *Andreas Knich* in tractatu de jure territorii. *Reinking. Lib. i. classe 5. cap. ii. n. 5. Oldendorp. classe iii. art. 2.*

^b *Nisi validissime sint in contrarium rationes*] *Menoehius i. cons. xc.*

¹ *Non plane idem esse*] *Balbus* de præscriptionibus id notavit, et in eodem argumento *Covarruvias. Reinking dic-*

ignorance, has no effect; and when there is another cause known which influences the will, conjecture as to what it is ceases.

VI. To establish the assumption of these two conditions, other conjectures are of force: but for the most part, the effect of time, in both points, is great. For in the first place, it can hardly happen that in a long time, a thing pertaining to any one should not come to his knowledge, since time supplies many occasions. And a shorter time is sufficient for this purpose in a case between persons present, than absent, even without referring to the Civil Law. So fear once impressed is understood to last for a certain time, but not for ever, since a long time affords many occasions of taking counsel against the danger, either by one's own means or by means of others; as by going out of the bounds of the authority of him who inspires the fear; or at least, it affords the means of renewing our right by protest, or,

lictæ conjecturam semper sufficere videbitur, ^bnisi validissimæ sint in contrarium rationes. Bene autem notatum est a prudentioribus jurisconsultis, ⁱnon plane idem esse tempus memoriam excedens cum centenário, quanquam sæpe hæc non longe abeunt: quia ^kcommunis humanæ vitæ terminus sunt anni centum: quod spatium ferme solet ætates hominum, aut ^lγεωαὶς tres efficere: quas Antiocho Romani objiciebant, cum ostenderent repeti ab eo urbes, quas ipse, pater, avus nunquam usurpassent.

Eustath. ad
Iliad. I. v.
250.

Liv. xxxiv. 58.

VIII. 1 Objiciat aliquis, cum homines se suaque ament, non debere eos credi quod suum est jactare, ac proinde actus negativos, etiam cum magno temporis spatio, non sufficere ad eam quam diximus conjecturam. Sed cogitare rursum debemus bene sperandum de hominibus, ac propterea non putandum eos hoc esse animo, ut rei caducæ causa hominem alterum velint in perpetuo peccato versari, quod evitari sæpe non poterit sine tali derelictione.

to Lib. i. classe 5, c. ii. n. 40. de tempore memoriam excedente: vide eruditissimum Fabrum in consilio pro ducatu Montisferratensi.

^k *Communis humanæ vitæ terminus*
Αἰῶνος μᾶλλον ἢ περ χρόνου dixit Justinianus in edicto quinto, edito in notis ad arcanam historiam Procopii.

^l *Γεωαὶς tres*] Nam γεωαὶς est τριακοστᾶς, triginta annorum ætas, ut Porphyrius notat in Homericis quæstio-

nibus. (pag. 99. Edit. Barnes.) tres γεωαὶς sæculum exponit Herodianus Severo. (Lib. iii. cap. 8. Ed. Bæcl.) in ccc. annis decem in Ægypto fulsæ reges notat Philo in legatione. Lacedæmone annis quingentis reges quatuordecim, Plutarcho indicante in Lycurgo. (Pag. 58 A.) Justinianus in novella clix. vetat in judicia deduci causam, quod jam quatuor γεωαὶς exlissent. (cap. 2.)

what is better, of referring to judges or arbitrators.

VII. Since time beyond the memory of man is morally, as it were, infinite, a silence for such a time will always suffice to establish derelict, except there are very strong reasons on the other side. It is well remarked by the more prudent jurists, that time beyond the memory of man is not the same thing as a century, though the two periods are often not very different; because the common term of human life is a hundred years; which period commonly includes three generations of men; as the Romans objected to Antiochus, when they pointed out that he asked for cities which neither he, nor his father, nor his grandfather, had ever had.

VIII. 1 It may be objected that men are fond of their property, and that negative acts, even in a great length of time, ought not to be taken as proving that they throw it away. But, on the other hand, we ought to think well of men, and not to suppose that they would

tis: nam 'non agere nescientis, caret effectu; et alia causa cum apparet, cessat conjectura voluntatis.

VI. Ut hæc igitur duo adfuisse censeantur, ²valent et aliæ conjecturæ: sed temporis in utrumque magna vis est. Nam primum fieri vix potest, ut multo tempore res ad aliquem pertinens non aliqua via ad ejus notitiam perveniat, cum multas ejus occasiones subministret tempus. Inter præsentis tamen minus temporis spatium ad hanc conjecturam sufficit, quam inter absentes, etiam seposita lege civili. Sic et incussus semel metus durare quidem nonnihil creditur, sed non perpetuo, cum tempus longum multas occasiones adversus metum sibi consulendi, per se, vel per alios suppetat, etiam exeundo fines ejus qui metuitur, saltem ut protestatio de jure fiat, aut, quod potius est, ad judices aut arbitros provocetur.

*L. Hoc Jure,
S. § ductus, &
D. de Aqua
Quod. et Alt.*

VII. Quia vero ³tempus memoriam excedens quasi infinitum est moraliter, ideo ejus temporis silentium ad rei dere-

¹ *Non agere nescientis, caret effectu]*
Vide infra hoc libro, cap. xxi. § 11.
Adde si vacat *Bart. Soc. consilio*
CLXXXVII. col. 8. Meischnerum deci-
sione Camerali ix. n. 113. Tom. III.

² Non tam ex derelictione tacita, cujus præsumtio satis firma ut plurimum non adest, quam ex jure Possessoris bonæ fidei et ipso fine Dominii constituti, fundamentum juris istius deducendum esse, ostendimus ad *PURENDORFIUM* nostrum, *De Jure Nat. et Gent.*

in Notis alteri Editioni adjectis, Lib. iv. cap. xii. § 8. Totum illud Caput in hanc rem conferri potest. *J. B.*

³ *Tempus memoriam excedens]* Andreas Knich in tractatu de jure territorii. Reinking. Lib. I. classe 5. cap. II. n. 5. Oldendorp. classe III. art. 2.

⁴ *Nisi validissime sint in contrarium rationes]* Menochius I. cons. xc.

⁵ *Non plane idem esse]* Balbus de præscriptionibus id notavit, et in eodem argumento Covarruvias. Reinking dic-

ignorance, has no effect; and when there is another cause known which influences the will, conjecture as to what it is ceases.

VI. To establish the assumption of these two conditions, other conjectures are of force: but for the most part, the effect of time, in both points, is great. For in the first place, it can hardly happen that in a long time, a thing pertaining to any one should not come to his knowledge, since time supplies many occasions. And a shorter time is sufficient for this purpose in a case between persons present, than absent, even without referring to the Civil Law. So fear once impressed is understood to last for a certain time, but not for ever, since a long time affords many occasions of taking counsel against the danger, either by one's own means or by means of others; as by going out of the bounds of the authority of him who inspires the fear, or at least, it affords the means of renewing our right by a

quam quæ adjuvant conjecturæ, favorabiles putandæ sunt. Nam si durum putavit ²Aratus Sicyonius privatas quinquaginta annorum possessiones labefactari, quanto magis illud Augusti tenendum est, eum virum bonum ac civem esse, qui præsentem reipublicæ statum mutari non vult, et qui, ut apud Thucydidem Alcibiades loquitur, ὅπερ ἐδέξατο σχῆμα τῆς πολιτείας τοῦτο ξυνδιασώζει: quod τὴν παρούσαν πολιτείαν διαφυλάττειν dixit ³Isocrates adversus Callimachum: sicut et Cicero oratione ad Quirites contra Rullum, otii et concordiæ patrono convenire ait, defendere statum reipublicæ qui quoque tempore sit: et Livius, optimum quemque præsentī statu gaudere. [[Cic. Off. II. 23 c.]]
[[Macrobius Saturnalis, Lib. I. c. 4 § 18 c.]]
Lib. VI. 70.
Lib. XXXV. 34.

4 Quod si etiam deficerent ea quæ jam diximus, tamen adversus præsumptionem, qua quisque sua servare velle creditur, validior est altera, quod credibile non est quemquam ejus quod vult, longo tempore ^onullam plane edere significationem idoneam. Ang. de Clavasio in Summa, in Verb. Invent.

IX. Ac forte non improbabilius dici potest non esse hanc rem in sola præsumptione positam, sed ^pjure gentium

observaverat in nota ad laudatum Justinī locum: quod forte ansam dedit errori Auctoris nostri. *J. B.*

³ Est apud Oratorem τὴν παρούσαν εὐχὴν διαφυλάττειν, circa finem Orationis, pag. 383 n. *Ed. H. Steph. J. B.*

^o Nullam plane edere significationem idoneam] Crantziius Saxoniorum XI. n. 10 et 13.

^p Jure gentium voluntario inductam

hanc legem] Narrat Gregoras cum Cætanæ majoribus data esset ab Imperatoribus Græcis Phocæa, adjectam legem, ut singuli successores scriptam eederent professionem se eam tenere administrationum titulo, μὴ λάθῃ παρακρουσάμην τὴν βασιλικὴν δεσποτείαν ἢ μεταξὺ τοῦ χρόνου μακρὰ περίοδος ne inobservatus diuturni temporis lapsus jus imperatoris excluderet. [Lib. XI. circa init. Pag. 230. *Ed. Genev. 1616.*]

ments should at some time be placed beyond the risk and doubt of controversy; and the modes of settling the matter which have this tendency are to be preferred. If Aratus thought it hard that private possession of 50 years should be disturbed, we must still more hold by the saying of Augustus, that a good citizen does not wish the present state of the republic to be changed. So Alcibiades in Thucydidēs, Isocrates, Cicero, Livy.

4 And even if these arguments were wanting, the presumption that each man wishes to keep what he has, may be met by another presumption, that no man will stay a very long time without giving some indication what his wishes are.

IX. And perhaps we may say that this is not merely a matter of presumption, but that this law was introduced by an instituted law of nations, that a possession going beyond memory uninterrupted, and

voluntario inductam hanc legem, ut possessio memoriam excedens, non interrupta, nec provocatione et arbitrum interpellata, omnino dominium transferret. Credibile est enim in id consensisse gentes, cum ad pacem communem id vel maxime interesset. Merito autem dixi possessionem non interruptam, id est, ut Sulpitius apud Livium loquitur, *uno et perpetuo tenore juris semper usurpato, nunquam intermisso*. Idem alibi dixit: *perpetuam possessionem, ac nullo ambigente*. Nam desultoria possessio nihil efficit, quomodo Numidæ excipiebant adversus Carthaginienses: *per opportunitates nunc illos, nunc reges Numidarum usurpasse jus, semperque penes eum possessionem fuisse, qui plus armis potuisset*.

Lib. xxxv. 16.

Ibid. num. 2.

Apud Euseb.
xxxiv. 62.

X. 1 Sed alia hic, et quidem perdifficilis, suboritur quæstio, an nondum natis jus suum tacite tali derelictione possit decedere. Si non posse dicimus, nihil ad tranquillitatem imperiorum ac dominiorum profecit modo data definitio, cum pleraque talia sint, ut posteris debeantur. Sin posse affirmamus, mirum videbitur quomodo nocere silentium possit his, qui loqui non potuerunt, quippe cum nec existerent; aut quomodo aliorum factum aliis damno esse possit.

2 Ad hujus nodi solutionem sciendum est, ejus qui non-

¶ *Neque dum existentes eorum jure qui expectari possunt*] Multa sunt in historiis talium derelictionum exempla. Vide unum illustre in Ludovico IX.

Francorum rege, pro se liberisque abdicante jus, quod per Blancam matrem in Castellæ regnum habere poterat, apud Marianam libro XIII. c. 18.

not accompanied with any appeal to justice, absolutely transfers ownership. It is credible that nations have agreed upon this, since such a rule tends greatly to peace. But it is essential to require uninterrupted possession, as stated in Livy. For a desultory possession is of no efficacy, as the Numidians urge against the Carthaginians, also in Livy. [See.]

X. 1 But another and an important question arises here: whether those not yet born may tacitly lose their rights by such *dereliction*. If we say they cannot, the definition just given is of no avail for the tranquillity of authority and ownership, since most kinds of these are such that they belong to posterity. If we say that they can, it will appear strange how silence can prejudice those who cannot speak because they do not exist; and how the act of others can be allowed to harm them.

2 For the solution of this difficulty, it is to be observed, that he who is not yet born has no rights, as a thing not existing has no attributes. Wherefore if the people, from whose will the right of reigning pro-

dum natus est nullum esse jus, sicut nec ulla sunt accidentia rei non existentis. Quare si populus, a cujus voluntate jus regnandi proficiscitur, voluntatem mutet, iis qui nondum nati sunt, ut quibus jus quæsitum nondum est, nullam facit injuriam. Sicut autem populus expresse mutare voluntatem potest, ita et tacite credi mutasse. Mutata igitur populi voluntate, ¹neque dum existente eorum jure qui expectari possunt; parentibus autem e quibus nasci possunt, qui jus suo tempore essent habituri, id ipsum jus derelinquentibus, nihil est quod obstat quominus illud ut derelictum ab alio occupari possit.

3 Agimus de naturali jure: nam jure civili ut aliæ fictiones ita et hæc introduci potest, ²ut eorum qui nondum sunt personam lex interim sustineat, atque ita impediat ne quid adversum eos occupari possit: quod tamen leges velle non temere censendæ sunt, quia privata ista utilitas publicæ valde repugnat. Unde et illa feuda, quæ non ex jure proximi possessoris, sed ex vi investituræ primitivæ deferuntur, longo satis tempore acquiri posse receptior sententia est; quod ad jura majoratus, et ad res fideicommisso obnoxias non infirmis rationibus subnixus producit summi judicii jurisconsultus Covarruvias.

C. Possessor.
p. 3. § 3.

¹ *Ut eorum qui nondum sunt personam lex interim sustineat*] *Ut lex civilis in hereditate jacente.* [L. 34. D. de

acquir. rer. domin. L. 13. § 5. Quod vi aut clam. &c.]

ceeds, changes its will, it does no injury to those who are not yet born, and who have not yet acquired any right. And as the people may change its will expressly, it may also tacitly be presumed to have changed it. If then the will of the people be changed, and since the right of the expected progeny does not yet exist, and the parents from whom they are to be born relinquish their right, nothing prevents its being *occupied* by another as a derelict.

3 In this we speak of Natural Law: for by the Civil Law, as other fictions may be introduced, so this also, that the law may represent the part of the persons who do not yet exist, and may thus prevent adverse occupation being a prejudice to them: which purpose of the law, however, is not lightly to be assumed, because *that* private advantage is much at variance with public utility. Whence those fiefs which [by law] are conveyed, not by the right of the last possessor, but by a primitive investiture in each vacancy, may, by a sufficiently long usage, be acquired [as territory], as the best jurists hold. Covarruvias has asserted this with strong reasons, respecting rights of primogeniture and entailed estates.

*Spec. Tit. de
Fisc. § quo-
niam. vers. 3.
Quaritur.
Chass. de
Cons. Burg.
des mains-
mortes. § 6.
vers. par an
et jour. n. 2.
Cravet. de
Ant. Temp.
p. 4. § male-
ria. n. 90.*

4 Nihil enim prohibet quominus lege civili jus tale intro-
duci possit, quod uno actu alienari licite non possit; possit
tamen ad vitandam dominiorum incertitudinem certi tempo-
ris neglectu amitti: atque ita etiam, ut exstituris salva sit
actio personalis adversum eos qui neglexerunt, aut eorum
heredes.

XI. Ex his quæ diximus apparet, et regi adversus re-
gem, et populo libero adversus populum liberum jus acquiri
posse, ut expresso consensu, ita derelictione, et eam secuta,
aut ex ea vim novam capiente apprehensione. Nam quod
dicitur, quæ ab initio non valent, ex post facto convalescere
non posse, hanc habet exceptionem, nisi causa nova per se
parere idonea intercesserit. Similiter et alicujus populi rex
verus amittere poterit regnum et populo subjici; et qui re-
vera non rex, sed princeps erat, rex summo cum imperio

* *Rex summo cum imperio fieri*]

§ 10.

Vide Vasquium controversiarum illus-
trium, Lib. 1. c. xxiii. 3. Adde eundem
Lib. II. c. lxxii. 8, 9. et sequentibus:
vide et Panormitanum, Lib. 1. cons. 82.
et Peregrinum *De Jure Fisci*, vi. c. viii.

† *Nos aliter arbitramur*] Et Don
Garcias Mastrill, *de Magistratu* Lib.
III. c. xi. 26: Joh. Oldendorpius consil.
Marp. v. n. 47. volum. 1.

‡ *Qua scilicet pars est communitatis*]

4 For nothing prevents the Civil Law from introducing such a
Right as cannot be alienated by one act, but yet, in order to avoid
the uncertainty of ownership, may be lost by neglect after a certain
time: but in such a way that future claimants shall retain a right of
personal action against those who have committed the neglect, or
their heirs.

XI. From what we have said, it appears that both a king as
against a king, and a free people as against a free people, may acquire
a right, not only by express consent, but by dereliction and posses-
sion following this, or taking a new force from it. For as to what is
said, that what is not legally valid at first cannot become valid by the
subsequent fact, it is to be taken with this exception, except a new cause
intervene, fit of itself to produce such validity. And thus [by the
course of usage] the king of any people may lose his authority and
become subject to the people; and he who was not king, but only
governor, may become king with absolute authority; and the sovereign
authority, which at first was in the king or in the people wholly, may
be shared between them.

XII. 1 This also is a question worth examining*: Whether the

* Gronovius treats this as the question whether any rights belonging to the
sovereignty can be matter of prescription; and says that Grotius's opinion, that
they cannot, is both servile, and dangerous to princes; for the power of princes has

feri, et summum imperium quod penes populum, aut penes regem in solidum erat, inter eos dividi.

XII. 1 Illud etiam indagari operæ pretium est, an lex de usucapione aut præscriptione, condita ab eo qui habeat summum imperium, pertineat etiam ad ipsum jus imperi, et ejus partes necessarias, quas alibi explicavimus. Pertinere arbitrari videntur jurisconsulti non pauci, qui quæstiones de summo imperio ex jure tractant civili Romanorum. 'Nos aliter arbitramur: nam ut quis legibus obligetur, requiritur in legis auctore et potestas, et voluntas, saltem præsumta. Se per modum legis, id est, per modum superioris, obligare nemo potest: et hinc est quod legum auctores habent jus leges suas mutandi: Potest tamen quis obligari sua lege, non directe, sed per reflexionem, "qua scilicet pars est communitatis ex æquitate naturali, quæ partes vult componi ad rationem inte-

Vide infra hoc libro, cap. xx. § 24. Seneca epistola LXXXV. *Duas personas habet gubernator: alteram communem cum omnibus qui eandem conscenderunt navem, qua ipse quoque vector est, alteram propriam qua gubernator est.* Trac-

tant hoc Claud. Seissellus de *Rep. Gall.* Lib. I. (cap. 12). Chassanzenus de *Gloria Mundi* parte v. cons. 5. Gaillius Lib. II. obs. LV. num. 7. Bodinus de *Republica*, Lib. I. c. viii. Reinking 1. c. xlii.

Bart. in l. Hostes. D. de Capt. et in l. i. D. de Acq. Plur. Arc. Jas. Cons. 70. Lib. iii. Aymon. de Antiq. p. 4. verfic. materia lita. n. 73. Ant. Corsetus de Excell. Rep. q. 104. Balb. de Præc. 1. p. princ. et 2. part. q. 2. Castal. de Imp. quest. 63. et Covar. in c. Peccat. de Reg. Jur. in 6. p. 2. § 2. in fine.

law of usucaption or prescription, made by the sovereign, may affect the right of sovereign authority, and its necessary parts, which we have elsewhere explained (B. I. c. iii. § vi.). Not a few of the Jurists seem to think that it may, treating this question of the sovereignty as a matter of Civil Law. We think otherwise. For in order that any one may be bound by a law, there is required both power and will, at least presumed, in the author of the law. But no one can bind himself in the manner of a law, that is, in the character of a superior: and hence it is that the authors of laws have the right of changing their laws. However, a person may be bound by his own law, not directly, but by reflexion; namely as being a part of the community, in virtue of natural equity, which requires the component parts to follow the analogy of the whole. So Saul put himself and his son

in many cases been increased by prescription; and where the power of the people rests upon prescription, if kings refuse to allow it, they are involved in seditions and troubles, like Charles I. in England.

But Barbeyrac remarks that Grotius is speaking of Usucaption and Præscription as defined according to the rules of Civil Law; and that he allows in Art. 2 of this section, that parts of the sovereignty may be established by usage, even in shorter times than the Civil Law requires for prescription. To which we may add, that Gronovius in another note ⁽¹⁾, asserts that the people cannot be supposed to give up its "most just, certain and eternal possession," namely its sovereign rights; thus going much beyond Grotius on one side of the question.

gri: quod a Saule in regni initiis observatum notat sacra historia, Sam. xiv. 40. Sed hoc hic locum non habet, quia legum auctorem hic consideramus, non ut partem, sed ut eum, in quo virtus insit integri: agimus enim de summo imperio qua tali. Sed nec voluntas adfuisse præsumitur: quia legum auctores non censentur se velle comprehendere, nisi ubi et materia, et ratio legis sunt universales, ut in æstimandis rerum pretiis. At summum imperium non est paris rationis cum rebus aliis: imo nobilitate sua res alias multum excedit. Neque ullam vidi legem civilem de præscriptione agentem, quæ summum imperium comprehenderet, aut comprehendere voluisse probabiliter censi posset.

2 Unde sequitur, neque tempus lege definitum sufficere ad acquirendum summum imperium aut partem ejus necessariam, si desint conjecturæ naturales, de quibus supra egimus: neque tantum temporis spatium requiri, si intra id tempus eæ conjecturæ quantum satis est adsint: neque legem civilem quæ acquiri certo tempore res vetat, ad res summi imperii pertinere. Posset tamen in ipsa imperii delatione populus

⁴ Verius est, non posse a subdito plene adquiri longi temporis possessione ullum jus, quod ad summum imperium

pertinet. Dicemus in Notis Gallicis ad hunc locum. Vide interim Dissertationem Clarissimi et Celeberrimi Jcti

Jonathan on the same footing as the rest of the people, 1 Sam. xiv. 40. But this does not apply in the case which we are now treating; for we consider the author of the law, not as a part of the community, but as him in whom the whole legislative virtue resides; for we speak of the sovereignty as such. [Therefore the sovereign has not the power of binding himself by such laws.] But neither can he be presumed to have the will; for the authors of laws are not supposed to include themselves, except both the matter and the reason of the law are universal; as in settling prices by law. But the sovereignty has not parity of reason with other things; on the contrary, it is a matter of a higher order than other things.

Nor have I ever seen a civil law treating of prescription, which comprehended in its sphere the sovereign power, or could be probably supposed to have comprehended it.

2 Whence it follows that the time defined by law is not sufficient to acquire the sovereignty or any necessary part of it, if there are wanting those natural conjectures of which we have before spoken; and that if those conjectures exist to a satisfactory extent, so great a space of time is not required; and that the Civil Law, which prohibits a possession being acquired in a certain time [by prescription], does not apply to the Sovereignty.

suam exprimere voluntatem; quo modo ac tempore amitti imperium non utendo posset: quæ voluntas sequenda haud dubie esset: nec infringi posset a rege etiam summum imperium obtinente: quia non ad imperium ipsum, sed ad ejus habendi modum pertineret: quo de discrimine alibi diximus.

XIII. Ea vero, quæ de summi imperii natura non sunt, nec ut proprietates naturales ad eam pertinent, sed aut separari ab ea naturaliter possunt, aut saltem cum aliis communicari, omnino subjacent legibus populi cujusque civilibus, quæ de usucapione et præscriptione factæ sunt. ^{Covax. c. Poes. part. 2. § 2. n. 12, 13.} Sic subditos esse videmus, qui præscriptione acquisierunt, ut appellari ab iis non possit: ita tamen ut semper aliqua ab eis sit provocatio, per supplicationem scilicet, vel alium modum. Nam ut ab aliquo nulla ratione possit provocari, cum persona subditi pugnat, ac proinde ad summum imperium aut partem ejus pertinet, nec potest aliter acquiri quam secundum jus naturale, cui summa imperia subjacent.

XIV. 1 Ex his apparet, quatenus recipi possit ^{*}quod aiunt nonnulli, semper licere subditis si possint in libertatem,

Hallensis, CHRISTIANI THOMASII, *De Præscriptione Regalium ad jura Subditorum non pertinente*, ann. 1696. Halæ

Saxonum editam. J. B.

^{*} Quod aiunt nonnulli] Ut Vasquius dicto libro II. c. lxxxii. n. 3.

It would however be possible that the people, in conferring the sovereignty, should express its will in what way and in what time the supreme authority might be lost by disuse; which will would undoubtedly be to be followed, and could not be infringed, even by a king possessed of the sovereign power; because it pertains, not to the sovereignty itself, but to the mode of holding it; of which difference we have elsewhere spoken.

XIII. But [though the sovereignty is thus exempt from the Rules of the Civil Law] those things which are not of the nature of the sovereignty, and do not belong to it as natural properties, but can either be naturally separated from it, or communicated to others, are altogether subject to the rules of Civil Law concerning Usucaption and Prescription. So we see that there are subjects who have by prescription acquired the Right that there is no appeal from them; but yet so that there is always some mode of carrying the matter to a higher tribunal, by petition, or in some other way. For that there should not be in any way an appeal from a person, is at variance with the notion of a subject: it belongs to a sovereignty or a part of it; and cannot be acquired otherwise than according to Natural Law, which regulates the sovereignty.

XIV. 1 Hence it appears how far we are to receive the doctrine

De Bell. Jud.
II. 16. § 4.

De Bell. Jud.
v. 9. § 3.

eam scilicet, quæ populi est, se vindicare : quia quod vi partum est imperium, vi possit dissolvi ; quod autem ex voluntate sit profectum, in eo pœnitere liceat, et mutare voluntatem. Nam et quæ vi parta primum sunt imperia, possunt ex voluntate tacita jus firmum accipere, et voluntas aut ex initio constituti imperii aut ex post facto esse potest talis, ut jus det quod in posterum a voluntate non pendeat. Agrippa rex apud Josephum in oratione ad Judæos, qui ex præpostero repetitæ libertatis studio Zelotæ dicti sunt, sic ait : *Intempetivum est nunc libertatem concupiscere. Olim ne ea amitteretur certatum oportuit. Nam servitutis periculum facere durum est, et ne id subeatur, honesta certatio. At qui semel subactus deficit, non libertatis amans dicendus est, sed servus contumax.* Atque ipse Josephus ad eosdem : *Honestum quidem est pugnare pro libertate, sed id olim factum oportuit. At qui victi semel sunt et longo tempore paruerunt, si jugum excutiant, faciunt quod desperatorum*

1 Honestum pugnare pro libertate, sed id olim factum oportuit Eadem ferme verba reperies in oratione comitis Blanderatensis ad Mediolanenses apud

Radevicum I. c. 40.

2 De Juribus illis, qui dicuntur meræ facultatis, et, inter alia, de latione pignoris, legi dignissima Dissertatio singu-

which some put forth, that it is always lawful for subjects, if they can, to obtain their liberty, that is, Civil liberty ; because the authority which was gained by force may be taken away by force ; and in regard to that which was given voluntarily, they may repent and change their mind. [But this goes too far.] For authority gained at first by force may by tacit consent receive firm right : and the will exercised, either in the original institution of a government, or at an after period, may be such as to give a right which afterwards does not depend upon the will. King Agrippa said to the Zealots who were clamorous for liberty, It is now out of season to demand liberty. You should have fought formerly, not to lose it. For submission is a hard lot, and it is honourable to fight in order to avoid it. But when a person has once been overcome in such a struggle, if he shake off the yoke, he is no longer a lover of liberty, but an insurgent slave. And so Josephus himself said ; and Cyrus to the king of Armenia. [See.]

2 But that a long forbearance of the king, such as we have before described, may be a sufficient ground of the people obtaining its liberty from a presumed relinquishment of imperial authority, is not to be doubted.

XV. But rights which do not involve daily exercise, but are exercised, once for all, at a convenient time, as the loosing of a pledge ; also

hominum est, non quod libertatem amantium. Et hoc ipsum Cyrus olim Armenio regi dixerat, qui rebellionis suæ obtendebat libertatis pridem amissæ desiderium.

Xenoph. de
Cyr. Inst.
lib. 1. § 6, 7.

2 Ceterum quin et regis longa patientia talis, qualem supra descripsimus, possit populo sufficere ad pariendam libertatem publicam, ex præsumta imperii derelictione, minime dubitandum arbitror.

XV. Jura vero, quæ non habent quotidianum exercitium, ¹sed semel ubi commodum erit, ²ut luitio pignoris; item jura libertatis, quibus actus is qui exercetur non est directe contrarius, sed ei inest ut pars suo integro; velut si quis per centum annos societatem cum uno duntaxat vicino habuerit, cum tamen habere et cum aliis posset; non amittuntur nisi ex quo tempore intercessit prohibitio aut coactio, eique paritum est cum sufficienti consensus significatione: quod cum non juri civili tantum, sed et rationi naturali congruat, merito locum habebit etiam inter summæ fortunæ homines.

laris Collegæ mei Clarissimi et Juris peritissimi P. de Toulieu, quæ tertia ordine est in *Dissertationum Juridarum Triade*, Ultrajecti ann. 1706. edita.

De re ipsa dicemus in Notis Gallicis ad hunc locum. *J. B.*

¹ *Ut luitio pignoris*] Vide Parutani *Historia Veneta* VII.

freely used rights*, to which the act exercised is not directly contrary, but is contained in it as a part in the whole;—as if any one should for a hundred years have alliance with one only of his neighbours, when he might have it with others also;—are not lost, except for the time when prohibition or coercion intervenes, and obedience is rendered to it with a sufficient signification of consent; and since this agrees, not only with Civil Law, but with natural reason, will properly have place also among the most exalted persons. [Such persons will not attempt to control the exercise of those rights.]

* In the table of contents at the head of the chapter, the subject of this section is thus given: *Rights which are mere facultatis, are not lost in any course of time; Jura mere facultatis* are Rights which a man possesses but is not bound to exercise.

CAPUT V.

DE ACQUISITIONE ORIGINARIA JURIS IN PERSONAS: UBI DE JURE PARENTUM: DE MATRIMONIIS: DE COL- LEGIIS: DE JURE IN SUBDITOS: SERVOS.

- | | |
|--|---|
| I. <i>De jure parentum in liberos:</i> | <i>gibus appellentur nomine concubinatus.</i> |
| II. <i>Distinctio temporis infantie: et ibi de infantium dominio in res:</i> | XVI. <i>Posse quædam connubia illicita contrahi, et tamen rata esse.</i> |
| III. <i>Temporis extra infantiam in familia:</i> | XVII. <i>Jus majoris partis in quibusvis societatibus.</i> |
| IV. <i>Ibi de jure coercendi liberos:</i> | XVIII. <i>Pari numero quæ sententia prævaleat.</i> |
| V. <i>De jure vendendi liberos:</i> | XIX. <i>Quæ sententiæ dividendæ aut conjungendæ.</i> |
| VI. <i>Temporis extra infantiam et familiam.</i> | XX. <i>Absentium jus præsentibus accrescere.</i> |
| VII. <i>Distinctio potestatis parentum naturalis et civilis.</i> | XXI. <i>Ordo quis inter pares, etiam reges.</i> |
| VIII. <i>De jure mariti in uxorem.</i> | XXII. <i>In societatibus, quæ fundamentum habent in re, sententiæ cestimandas secundum partes quas quisque habet in re.</i> |
| IX. <i>Insolubilitas et adstrictio ad unam uxorem an sint necessariae ad matrimonium ex lege evangelica.</i> | XXIII. <i>Jus civitatis in subditos.</i> |
| X. <i>Jure naturæ solo irrita non esse connubia ob defectum consensus parentum.</i> | XXIV. <i>An civibus a civitate discedere liceat, per distinctionem explicatur.</i> |
| XI. <i>Ex lege evangelica irrita esse connubia cum alieno viro et uxore.</i> | XXV. <i>Jus civitati nullum in exules.</i> |
| XII. <i>Illicita et irrita esse jure naturæ connubia parentum cum liberis.</i> | XXVI. <i>Jus ex consensu in filium adoptatum.</i> |
| XIII. <i>Connubia fratrum cum sororibus, item novercæ cum privigno, et socii cum nuru, ac similia, illicita et irrita esse jure divino voluntario.</i> | XXVII. <i>Jus in servos.</i> |
| XIV. <i>Non idem videri de connubiis cum propinquis ulterioris gradus.</i> | XXVIII. <i>Quatenus in hoc jure dicatur inesse jus vitæ ac necis.</i> |
| XV. <i>Posse esse quædam connubia et licita, quæ a le-</i> | XXIX. <i>Quid ex jure naturæ statuendum de his, qui ex servis nascuntur.</i> |
| | XXX. <i>Servitutis diversa genera.</i> |
| | XXXI. <i>Jus ex consensu in populum, qui se subjicit.</i> |
| | XXXII. <i>Jus ex delicto in personam.</i> |

I. **N**ON in res tantum, sed et in personas jus quoddam acquiritur, et originarie quidem ex generatione, consensu, delicto. Generatione parentibus jus acquiritur in liberos: utrique, inquam, parentum, patri, ac matri: ^ased si contendant inter se imperia, præfertur patris imperium, ob sexus præstantiam.

II. 1 Distinguenda autem ¹sunt in liberis tria tempora: primum tempus imperfecti judicii, τοῦ βουλευτικοῦ ἀτελοῦς, ut Aristoteles loquitur, dum abest προαίρεσις, vis electrix, ut ^{Pol. i. c. ult.} idem alibi: secundum tempus perfecti judicii, sed dum filius ^{Nic. iii. 4}

^a Sed si contendant inter se imperia, præfertur patris imperium] Seneca libro III. controversia XIX: *Præe partes sunt patris, secundæ matris.* Chrysostomus 1 ad Cor. XI. 8. ἐκόςως ὑποτέτακται τῷ ἀνδρὶ ἡ γυνή. ἡ γὰρ ἰσοτιμία μάχην ποιεῖ· merito viro femina subijcitur, nam equalitas honoris pugnam parit. (Tom. III. pag. 409. Edit. Savil.) Idem ad Ephesios capite IV. ἀρχὴ δευτέρα ἐστὶν ἡ γυνή. μήτε οὖν αὐτὴ τὴν ἰσοτιμίαν ἀπαιτεῖτω (ὑπὸ γὰρ τὴν κεφαλὴν ἐστὶ) μήτε ἐκεῖνος ὡς ὑποτεταγμένης καταφρονεῖτω. σῶμα γὰρ ἐστὶ. *Secunda potestas est mulier: neque ergo ipsa æquum sibi jus vindicet (sub capite enim est) nec eam, quod subdita sibi est, contemnat maritus: corpus enim est.* (Tom. VI. pag. 865). Deinde: δευτέρα ἐστὶν ἀρχὴ αὐτῇ, ἀρχὴν ἔχουσα καὶ πολλὴν τὴν ὁμοτιμίαν, ἀλλ' ὅμως ἔχει τι πλεον ὁ ἀνὴρ. *Altera potestas illa est, imperium et ipsa habens,*

multumque in honore consortii: sed tamen plusculum habet vir. (pag. 867). Augustinus epist. XCIX: *Filius ex legitimis nuptiis susceptus magis in patris est, quam in matris potestate.* (Ep. 262. § 11, secundum divisionem Benedictin.) Gregoras libro VII. ubi de Andronico Palæologo et Irene agit: προστιθεμένου δὲ καὶ τοῦ, μείζονα δύνασθαι τῆς μητρὸς τὸν πατέρα, τὸ κωλύον οὐδὲν τὴν τοῦ πατρὸς τελεσθῆναι βόλῃσιν ἐπὶ τῷ παιδὶ μάλλον ἢ τῆς μητρὸς. *Addebatur ille plus matre patrem posse, nec quicquam intercedere quominus patris de filio valeret voluntas, etiam præ materna.* (pag. 109. Edit. Genev. 1616). De reverentia matri debita vide L. congruentius. 4. c. *De Patria Potestate.*

¹ Confer, de toto isto argumento, PUFENDORFIUM nostrum, *De Jur. Nat. et Gent.* Lib. VI. cap. II. J. B.

CHAPTER V. *Of the original acquisition of Rights over Persons; wherein of the Rights of Parents; of Marriage; of Corporations; of Rights over Subjects, and over Slaves.*

I. There are rights over persons as well as over things; and these may be acquired by generation, consent, or delinquency.

Parents acquire a right over their children by generation; both parents, the father and the mother; but if there be a contention between the authorities, the authority of the father is preferred, as superior in sex.

II. 1 In Children, three periods of life are to be distinguished; first the period previous to years of discretion; next, the period when they have come to years of discretion, but remain part of the parents'

EUA. v. 10.

pars manet familiæ parentum, ἕως ἂν μὴ χωρισθῇ, ut loquitur idem Aristoteles: tertium postquam ex ea familia excessit.

^b In primo tempore omnes liberorum actiones sub dominio sunt parentum: æquum enim est, ut qui se regere non potest, regatur aliunde. Æschyli dictum est²:

Ætas prima, ceu brutum pecus,

Ut educetur mentis alienæ indiget.

At alius naturaliter inveniri non potest, cui regimen competat, quam parentes.

Supra c. 3.
§ 6.
De Fort. Alex.
li. p. 337 c.

2 Est tamen eo quoque tempore filius aut filia capax domini in res ex jure gentium, sed exercitium impeditur ob eam quam diximus judicii imperfectionem. Habent jus, ut de pueris Plutarchus loquitur, ἐν κτήσει, non ἐν χρήσει. Quare ut res omnes liberorum parentibus acquirantur non naturale est, sed ex quorundam populorum legibus, quæ et patrem a matre in hac re distinguunt, et filios non emancipatos ab emancipatis, et naturales a legitimis: quæ discrimina natura ignorat: excepta ea quam dixi sexus præstantia, si imperia inter se contendunt.

^b In primo tempore] Sunt ea ætate ita parentum, ut alia quæ parentes possident, ait Maimonides canonibus Penitentialibus capite vi. § 2.

² Græca ita se habent:

Τὸ μὴ φρονεῖν γὰρ, ἀποκρεῖ βίον,
Τότ' αὖτε ἀνάγκη, (ὥς γὰρ οὐ ἰ) τρώει φρονέον.
Choephor. pag. 257 [v. 753.] J. B.

family; third, the period when they have gone out of the family. [See Aristotle.]

In the first period, all the actions of the children are under the dominion of the parents; for he who cannot govern himself must be governed by another; and the parents are the natural governors. [See Æschylus.]

2 Yet even in this period, a son or daughter is capable of ownership over things *jure gentium*; but the exercise of this right is impeded by their imperfection of reason. They have the right to have, but not to use. Therefore that whatever becomes the property of the child becomes the property of the parents, is not Natural Law, but is an institution of the laws of certain peoples; which also in this matter distinguish the father from the mother, and sons not yet emancipated from paternal control, from those who are emancipated, and natural children from legitimate; which distinctions are unknown to nature; except the superiority of sex, when the authorities interfere, as we have mentioned.

III. In the second period, when the reason is matured by time, those actions only are subject to the authority of the parents which

III. In secundo tempore, cum jam judicium ætate maturit, subsunt parentum imperiis non aliæ actiones, quam ^cquæ ad familiæ paternæ aut maternæ statum aliquid momenti habent; æquum enim est, ut pars conveniat cum ratione integri. In ceteris autem actionibus habent tum liberi ἐξουσίαν, id est, facultatem moralem agendi, sed tenentur tamen in illis quoque studere semper, ut parentibus placeant. Verum hoc debitum cum non sit ex vi facultatis moralis, ut illa superiora, sed ex pietate, observantia, et gratiæ rependendæ officio, non efficit ut irritum sit, siquid contra sit factum, sicut nec irrita est donatio rei a quocunque domino facta contra parsimonix regulas.

IV. In utroque hoc tempore jus regendi etiam jus coërcendi complectitur, quatenus nempe vel cogendi sunt ad officium liberi, vel emondandi. De gravioribus autem pœnis quid sit sentiendum, alibi erit agendi locus.

V. Quanquam vero imperium paternum ita sequitur ipsam patris personam ac σχέσιν, ut avelli transferrique in alium non possit, potest tamen naturaliter, et ubi lex civilis non impedit, pater filium oppignorare, ^det, si necesse sit, etiam ven-

^c *Quæ ad familiæ paternæ aut maternæ statum aliquid momenti habent*] Ita explicat Maimonides legem, quæ est Num. xxx. 6.

^d *Et, si necesse sit, etiam vendere*] Jornandes *Historia Gothica*: *Haud enim secus parentes faciunt, salutem suorum pignorum providentes, satius*

have some important bearing upon the state of the paternal or maternal family: for it is equitable that a part should follow the analogy of the whole. In other actions, the children have, at that period, the moral right to act; but are bound, even in those, to endeavour to please their parents. But since this obligation is not founded in a jural right, like the above obligations [at the earlier period], but in piety, reverence, and the duty of repaying the benefits they have received, it does not render void what is done in transgression of it; as a donation made contrary to the rules of prudence by the owner is not void.

IV. In both these periods, the parents' right of governing includes also the right of coercing, so far as children require to be compelled to their duty or amended. What is to be done concerning greater punishments, we shall discuss elsewhere.

V. But although the paternal authority so far follows the person and position of the father, that it cannot be taken from him and transferred to another, yet by the Law of Nature, and where the Civil Law does not impede, the father may put his son in pledge, and if necessary, even sell him, when there is no other means of providing

cap. 7.

dere, ubi alia ratio eum alendi non suppetit: quod ex veteri Thebanorum lege (quam libro secundo recitat Ælianus) in populos alios videtur fluxisse: ipsa autem lex Thebana a Phœnicibus ac porro ab Hebræis venisse: quam ipsam obtinuisse et apud Phrygas docet Apollonius ³Epistola ad Domitianum. Censetur quippe ipsa natura jus dare ad id omne, sine quo obtineri non potest quod ipsa imperat.

VI. In tertio tempore filius in omnibus est ἀντεξούσιος, suique juris, manente tamen semper illo pietatis et observantiæ debito, cujus causa perpetua est. Unde sequitur, regum actus irritos dici eo nomine non posse, quod parentes habeant.

VII. ^eQuicquid extra hæc est, a lege est voluntaria, quæ alibi est alia. Sic jure quod Deus Hebræis dedit, potestas patris in filium aut filiam, ad dissolvenda vota non erat perpetua, sed durabat quamdiu liberi ⁴pars erant domus paternæ. Sic patria quædam potestas propria erat civium Romanorum, etiam in filios qui familiæ propriæ capita erant, quamdiu emancipati non erant. Qualem in liberos potestatem alios non habere ipsi Romani profitentur. Sextus Empiricus Pyrrhonicorum tertio: οἱ Ῥωμαίων νομοθέται τοὺς παῖδας ὑποχειρίους καὶ δούλους τῶν πατέρων κελεύουσιν εἶναι. καὶ τῆς οὐσίας τῶν παίδων μὴ κυριεύειν τοὺς παῖδας, ἀλλὰ τοὺς πατέρας,

Num. xxx. 2,
3, 4, 5. Lib.
de Præcept.
Leg. Præcept.
Vol. cccxlii.

Inst. de Pat.
Potest. § Jus
autem 2.
Cap. 24. n.
21.

deliberant ingemitatem perire quam vitam, dum misericorditer alendus quis venditur, potius quam moriturus servatur. (Cap. 26. pag. 75. Edit. Vulcan.) Eam legem video et apud Mexicanos fuisse.

³ Dicit in genere ἀποδίδοσθαι τοὺς αὐτῶν: additque, καὶ ἀνδραποδισθέντων μὴ ἐπιστρέφειν, et si forte quis ex suis in servitutem redigatur, non con-

vertuntur, ad illos scilicet liberandos. VII. Apoll. Lib. viii. cap. vii. pag. 346. Edit. Olear. Ubi (quod obiter observare liceat) luculentum exemplum est loquutionis μὴ ἐπιστρέφειν, pro non curare: quod accedere potest iis, quæ plena manu congegessit Clarissimus CLE-RICUS, ad explicandum τὸ Ὁculo ir-
tortio spectare Poëtæ Venusini, Art. Crit.

for him; which appears to have passed to other nations from an old law of the Thebans: as the Theban law came from the Phœnicians, and higher still, from the Hebrews [Exod. xxi. 7, *And if a man shall sell his daughter to be a maidservant, &c.* Romulus made the same law. Dionys. Halic. 2, 28. Gronovius.] The same held with the Phrygians. Nature is conceived to give a right to do every thing without which that cannot be obtained which nature demands: [as the sustenance of children.]

VI. In the third period, the son is independent and *sui juris*, the duty of piety and reverence still remaining, as its cause is perpetual. Whence it follows that the acts of kings are not void because they have parents alive.

ἕως ἂν ἐλευθερίας οἱ παῖδες τύχωσι κατὰ τοὺς ἀργυρωνήτους. παρ' ἐτέροις δὲ ὡς τυραννικὸν τοῦτο ἐκβέβληται. *Legum Romanarum auctores liberos in manu parentum ad instar servorum esse voluerunt; neque suorum bonorum ipsos esse dominos, sed parentes, donec manumittantur eo modo quo mancipia solent: quod alii ut tyrannicum repudiant.* Simplicius ad Epicteti enchiridium: οἱ δὲ παλαιοὶ τῶν Ῥωμαίων νόμοι καὶ πρὸς τὴν τῆς φύσεως ὑπεροχὴν ἀποβλέψαντες, καὶ πρὸς τοὺς πόνους οὓς οἱ γονεῖς ὑπὲρ τῶν τέκνων πονοῦσιν, ἅμα καὶ τοὺς παῖδας παντοδαπῶς ὑποτάξαι βουλόμενοι, καὶ τῇ τῶν γονέων οἶμαι φυσικῇ φιλοστοργίᾳ θαρρήσαντες, καὶ πιπράσκειν, εἰ βούλονται, τοὺς παῖδας τοῖς γονεῦσιν ἐπέτρεψαν καὶ φονεύειν ἀτιμωρήτως. *Antiquæ Romanorum leges, respicientes tum ad eam quæ a natura est eminentiam, tum ad labores quos pro liberis parentes sustinent, volentes præterea liberos parentibus sine exceptione subjectos esse, credo etiam confisæ naturali parentum amoris, et venundandi, si vellent, liberos, et impune interficiendi parentibus jus dederunt.* Simile patrum jus apud Persas, ut tyrannicum accusat Aristoteles: quæ ideo a nobis afferuntur, ut accurate distinguamus civilia a naturalibus.

In cap. 37. p. 199.

Ætic. Nic. viii. 12.

VIII. 1 Ex consensu jus in personas quod oritur, aut ex

Part. 1. cap. 2. § 11. J. B.

* *Quicquid extra hæc est, a lege est voluntaria*] Seneca de Beneficiis III. c. xi. quia utile est juventuti regi, imposuit illi quasi domesticos magistratus.

¹ *Pars erant domus paternæ*] Alioqui XIII. anno filius erat obligandi se capax

moribus Hebræis: ita illi ad dictum in numeris locum.

² *Legum Romanarum auctores*] Philo in Legatione: ἡ γὰρ νιοῦ πατρὸς ἐξουσία κατὰ τοὺς τῶν Ῥωμαίων νόμους ἀνάκειται πατρὶ. Patri enim in filium omnimoda potestas jure Quiritium competit. (Pag. 996 B.)

VII. Whatever goes beyond this, proceeds from instituted law, which is different in different places. Thus the right which God gave to the Hebrews, of making void the vow of a son or a daughter, was not perpetual, but lasted as long as they were part of the father's house. Thus the Romans had a *patria potestas* over sons, even those who were themselves heads of families, so long as they were not emancipated. This power over their children the Romans themselves remark that other nations had not. So Sextus Empiricus, Simplicius. [See.] Aristotle notes a similar right among the Persians as tyrannical. Where we are to distinguish accurately Civil Law from Natural Law.

VIII. 1 The right over persons which arises *ex consensu*, from

Eph. v. 23.

consociatione venit, aut ex subjectione. Consociatio maxime naturalis in conjugio apparet: sed ob sexus differentiam imperium non est commune, sed maritus uxoris caput, nempe in rebus conjugii, et in rebus familiæ: nam uxor pars fit familiæ maritalis. Ideo de domicilio constituere jus est marito. Siquid ultra juris maritis conceditur, ut lege Hebræa jus rescindendi quævis vota uxoris, apud populos nonnullos jus vendendi bona uxoria, non a natura est, sed ab instituto. Exigit hic locus ut videamus quid sit de natura conjugii⁴.

2 Conjugium igitur naturaliter esse existimamus talem cohabitationem maris cum femina, quæ feminam constituat quasi sub oculis et custodia maris: nam tale consortium et in mutis animantibus quibusdam videre est. In homine vero, qua animans est utens ratione, ad hoc accessit fides, qua se femina mari obstringit.

⁴ De tota ista materia confer PUFENDORF. *De Jure Nat. et Gent.* Lib. vi. cap. i. et quæ nos in Notis diximus, ut et ad libellum *De Officio Hom. et Civis*, Lib. ii. cap. xi. ultimarum Editionum. J. B.

^b *Viri sancti ante legem*] Chrysostomus de Sara: κακὴν πάλιν ἐσπούδασε τῆς ἀπαίδας ἐπινοῆσαι παραμβλῖαν αὐτῇ τινα ἀπὸ τῆς παιδείας· οὐδέπω γὰρ ταῦτα τότε κεκάλυτο· ἰπὴν vicissim studebat sterilis conjugii solatium ex ancilla quærere: nondum enim talia tunc vetita erant. [In 1 ad

Corinth. cap. xi. pag. 414. Tom. iii. Ed. Savil.] Eundem vide 1 ad Timoth. c. iii. (vers. 1. Tom. iv. pag. 286). Augustinus de doctrina Christiana libro iii. cap. xii: erat uxorum plurium simul uni viro habendarum inculpabilis consuetudo. Similia habet ibidem cap. xviii. Tum vero cap. xxii: Multa enim sunt: quæ illo tempore officiose facta sunt, quæ modo nisi libidinose fieri non possunt: et libro xvi. de Civitate Dei, cap. 38. quoniam multiplicandæ posteritatis causa plures uxores lex nulla prohibebat.

¹ *Et in lege*] Josephus Antiq. Histor.

consent, flows either from partnership or from subjection. The most natural form of partnership appears in marriage; but on account of the difference of sex, the authority is not common to the two; the husband is the head of the wife (Eph. v. 23); namely, in matters relating to the marriage union and to the family: for the wife is part of the husband's family. Thus to determine the place of domicile, is the husband's office. If any further rights are given to the husband, as by the Hebrew law, the right of disallowing the vows of the wife, and in some nations, the right of selling the wife's goods, this is not by Natural Law, but by institution.

The subject requires that we consider the nature of the marriage union.

2 Marriage, by Natural Law, we conceive to be such a cohabitation of the male and female, as places the female under the protection and custody of the male; for such a union we see in some cases in

IX. 1 Nec aliud ut conjugium subsistat natura videtur requirere: sed nec divina lex amplius videtur exegisse ante Evangelii propagationem. Nam et ^h viri sancti ante legem plures una uxores habuerunt, ¹ et in lege præcepta quædam ^{Deut. xxi. 15.} dantur his, qui plures una habeant, et regi præscribitur, ut ^{Deut. xvii. 16, 17.} nec uxorum nec equorum nimiam sibi adsciscat copiam, ubi Hebræi interpretes notant octodecim sive uxores sive concubinas regi fuisse concessas, et Davidi Deus imputat, ² quod ux- ^{2 Sam. xii. 8.} ores ei complures et quidem illustres dedisset.

2 Sic et dimittere uxorem volenti modus præscribitur, ^{Deut. xxiv. 4.} nec dimissam ducere quisquam impeditur, præter eum, qui dimisit, ¹ et sacerdotem. Hæc tamen ad alium maritum trans-eundi libertas ipso naturali jure ita restringenda est, ne inde oriri possit prolis confusio. Hinc illa apud Tacitum juris pontificii quæstio: *an concepto, necdum edito partu rite nuberet.* ^{Ann. l. 10.}

XVII. 1. *πάτριον ἐν ταυτῷ πλείοσι
ἡμῖν συνοικεῖν. Mos nobis patrius eo-
dem tempore plures habere uxores.*
(§ 2).

^k *Quod uxores ei complures et qui-
dem illustres dedisset*] Josephus eo his-
toricæ loco: *δόντος δὲ αὐτῷ καὶ γυναί-
κας, ὥς δικαίως καὶ νομίμως ἡγάγετο·
cum Deus ei uxores dedisset, quas juste
ac legitime habere posset, (Ant. Jud. vii.
7, § 3).* Pesictha ad Levit. xviii. nota-
simum ait esse, eum qui dicat vetitum
esse habere plures uxores nescire quid
sit de lege.

¹ *Et sacerdotem*] Levit. xxi. 7. Re-
pudiatus addita vidua ibidem vers. 14.
quod de principe sacerdote intellexit
Philo, (*De Monarch.* pag. 827 A.) et
plerique hodie interpretes, ob ea quæ
præcedunt commatæ 10. et deinceps.
Sed quemvis sacerdotem intelligi debere
ostendit Ezechiel xlii. 22. et in expli-
catione legis, ut et contra Apionem
primo Josephus: connectenda ergo lex
cum initio capituli, ut illa de pontifice
maximo obiter sint interposita. [At vero
Josephus diserte dicit, soli Sacerdotum
principi vetitum esse ducere Viduam,

mute animals. But in man, as being a rational creature, to this is added a vow of fidelity by which the woman binds herself to the man.

IX. 1 Nor does nature appear to require any thing more for the existence of marriage. Nor does the divine law seem to have required more, before the propagation of the gospel. For holy men, before the law, had more than one wife; and in the law, precepts are given to those who have more than one; and the king is commanded not to have many wives, or horses; whence the Hebrew commentators note that the king might have eighteen wives or concubines; and God says to David that he had given him many wives.

2 And in like manner a process is appointed for him who wishes to put away his wife; and no one is prohibited from marrying her who is put away, except him who put her away, and a priest. But this liberty of going to another husband is to be so restricted, even

Matth. v. 32;
xix. 9.

1 Cor. vii. 4.

Onetrocrit.

Apud Hebræos inter utrumque matrimonium tres menses interponi jubebantur. At Christi lex, ⁵ut res alias, ita et hanc conjugii inter Christianos ad perfectiorem redegit normam, ex qua et qui dimisisset uxorem non adulteram, et qui duxisset dimissam, adulterii reos pronuntiat: et apostolus ejus atque interpres Paulus, non viro tantum jus dat in corpus uxoris, quod et in naturali statu procedebat (ὁ γὰρ μὴ γινόμενος κατὰ νόμον ἀφροδίτης παντὸς ἀρχαί τοῦ σώματος τῆς συνοῦσης, inquit Artemidorus, id est, *qui connubii lege feminae conjungitur, is in corpus ejus dominium habet* :) sed et uxori vicissim in corpus mariti. ^mLactantius: *Non enim, sicut juris publici ratio est, sola mulier adultera est, quæ habet alium, maritus autem etiamsi plures habeat, a crimine adulterii solutus est. Sed divina lex ita duos in matrimonium, quod est in corpus unum, pari jure conjungit, ut adulter habeatur quisquis compagem corporis in diversa distraxerit.*

quum aliis Sacerdotibus id liceat: Τὸν δ' ἀρχιερέα μὲν τοι, οὐδὲ τεθνηκότος ἀνδρὸς ἡξίως γαμεῖν γυναῖκα, τοῦτο τοῖς ἄλλοις ἱερεῦσι συγχωρῶν. *Ant. Jud.* Lib. iii. cap. xii. § 2. *Edit. Hudson.* In loco autem ex Lib. i. *contr. Apion.* § 7. de Vidua ne γρὸν quidem. Hinc Auctor in adnotat. ad locum Levitici laudatum plane omisit Josephi testimonium. Quod autem conjicit de parenthesi, durum videtur. Confer SELDEN. *De Uxore Hebr.* Lib. i. cap. vii. et *de Success.* in

Pontific. Lib. ii. cap. 2. *J. B.]*

⁵ Auctor noster postea mutavit sententiam, ut patet ex Adnotationibus ejus in Matth. v. 32. ubi ostendit, in loco illo et aliis similibus Evangeliorum non damnati Polygamiam, sed tantum abusum Divortii, *quacumque ex causa facti.* Hinc in eximio opusculo de *Verit. Relig. Christ.* dicit tantum, *Christianos sequi morem Germanorum et Romanorum,* qui una uxore contenti fuerunt. Lib. ii. § 13. Et in Nota subjecta ibidem re-

by Natural Law, that no confusion of offspring shall arise. Hence the question of pontifical law in Tacitus; *whether after the conception and before the birth of the child a woman might lawfully marry.* By the Hebrew law three months must be interposed between the marriages.

But the law of Christ refers, as other things, so this, to a more perfect rule; and by this, pronounces him who had put away a wife, except an adulteress, and him who married one thus put away, as guilty of adultery; and Paul, his Apostle and Interpreter, not only gives the man a right over the body of the woman, which also was the Natural Law, [see Artemidorus] but also gives the woman right over the body of the man. So Lactantius says that each party may be guilty of adultery.

3 I know that most hold that, in both these places, Christ did not establish a new law, but restored that which God had established in the beginning of things; and to this opinion they are led by the words

3 Scio a plerisque existimari in utroque hoc capite non novam a Christo conditam legem, sed restitutam quam Deus pater rerum primordio condiderat : in quam sententiam adduxisse eos videntur ipsa Christi verba, ubi ad primordium illud nos revocat : sed responderi potest, ex prima illa conditione, qua uni mari feminam non nisi unam Deus attribuit, satis apparere quid optimum sit Deoque gratissimum : et hinc sequi semper id fuisse egregium ac laudabile : non tamen ut aliter facere nefas esset : quia ubi lex non est, ibi non est legis transgressio ; at lex de ea re nulla illis temporibus exstabat. Sic etiam cum dixit Deus sive per Adamum, sive per Mosem, tantum esse fœdus matrimonii, ut vir parentis familiam relinquere debeat, quo novam cum uxore familiam constituat : idem ferme dixit quod Pharaonis filiæ dicitur Psalmo xlv. 11. *Obliviscere populi tui, et domus patris tui.* Et ex hac tam arctæ amicitiae institutione satis apparet ^aDeo gratissimum

mittit tantum ad locum 1 Corinth. vii. 4. Sed de ea re egimus in Notis nostris Gallicis. J. B.

^m Lactantius] Libro institutionum vi. c. xxiii. ubi et hoc sequitur : *Exemplo continentia docenda est uxor, ut se caste gerat. Iniquum est enim, ut id exigas, quod ipse prestare non possis.* Sensus idem in Gregorio Nazianzeno, *πὺς ἀνδρῶν, οὐκ ἀνδρεῖσφ' ἐστὶν ;* quomodo exigit et non rependis ? [Orat. xxxi. pag. 500 c.] Hieronymus ad

Oceanum : *Aliæ sunt leges Cesarum, aliæ Christi : aliud Papinianus, aliud Paulus noster præcipit. Apud illos viris impudicitia fræna laxantur, et, solo stupro atque adulterio condemnato, passim per lupanaria et ancillulas libido permittitur, quasi culpam dignitas faciat, non voluntas. Apud nos quod non licet feminis æque non licet viris, et eadem servitus pari conditione censetur.* (Tom. i. pag. 198 c.)

^a Deo gratissimum esse] Et multis

of Christ, where he speaks of what was in the beginning. But to this it may be answered, that doubtless, from that first condition, in which God gave one woman to only one man, it does sufficiently appear what is best and most agreeable to God ; and hence it follows that such a condition was always excellent and laudable ; but it does not follow that it was sinful to do otherwise ; for where there is no law, there is no transgression ; and at that time, there was no law on that point in existence. Thus when God said, either through Adam or through Moses, that the marriage union was so close that a man must leave the family of his parent to make a new family with his wife, it is nearly the same as what is said to Pharaoh's daughter, Psal. xlv. *Forget also thy people, and thy father's house.* From this institution of so close a union, it appears sufficiently that it is most agreeable to God that that conjunction should be perpetual ; but it does not thence follow that God had then commanded that the tie should not be loosed on any account. But Christ forbid that man should put asunder what God had joined

Marc. x. 2.

esse, ut perpetua sit ea conjunctio: non tamen eo evincitur a Deo "jam tunc imperatum ne qua de causa fœdus illud solveretur. At Christus quod Deus institutione conjunxerat, id ab homine separari vetuit, ex eo quod optimum Deoque acceptissimum est, dignissimam lege nova desumens materiam.

De Morib.
Germ. c. 18.
Diod. l. p. 51.

4 Plerasque gentes certum est antiquitus ut divortiorum libertate, ita plurium feminarum conjugio usas. Prope solos barbarorum Germanos singulis uxoribus contentos suo tempore fuisse Tacitus memorat; idque passim ostendunt historiæ tum Persarum, tum Indorum. ^aApud Ægyptios soli sacerdotes unius feminae conjugio utebantur. Sed et apud Græcos Cecrops primus, teste Athenæo, *μίαν ἐνὶ ἑξέλευν, unam feminam uni marito attribuit*: quod tamen ne Athenis quidem

olim quoque sapientibus prælatus hic mos. Euripides in *Andromacha* ex persona Hermiones (vers. 177, et seqq.):

οὐδὲ γὰρ καλὸν

Δουὶν γυναῖκοις ἄνδρ' ἐν ἡρίας ἔχειν·
Ἄλλ' εἰς μίαν βλέποντες εὐναίαν Κύπριν
Στέργουσιν, ὅστις μὴ κακῶς οἰκεῖν θέλει.

non etenim docet

Unum imperare feminis geminis virum:
Contentus uno conjuga vivat toro,
Quicumque cupiet rite curatam domum.

Et in choro (vers. 464, et seqq.):

Οὐδέποτε' ἂν [l. οὐδέποτε] διδυμα

Δίετρ' ἐπαίνσω βροτῶν,

Οὐδ' ἀμφιμέτορας κόρους,

Ἐριν μὲν οἶκον,

Δυσμενέας τε λύπας.

Τὴν μίαν μοι στεργέτω πόσις γέμοις

Ἀκοινώητον εὐνῶν ἀνδρός.

Οὐδὲ γὰρ ἐν πόλει

Δίπτυχοι τυραννίδες

Μίας ἀμείνονες φέρειν,

Ἄχθος δ' ἐπ' ἄχθει,

Καὶ στάσις πολέταις.

Τεκτόνοις δ' ὕμνοισιν ἐργάταις δυοῖν

Ἐριν Μοῦσαι φιλοῦσι κραίνειν.

Πνοιαί δ' ὅταν φέρωσι ναυτίλους θοαί

Κατὰ πηδαλίον,

Διδύμα πρᾶξιδων γνώμα,

Σοφῶν τε πλήθος ἀβρόον ἀσθενέστατον

Φανλοτέρως φρενὸς αὐτοκρατοῦς

Ἐνδὲς ἂ δύναμις ἀνά τε μέλαθρα,

Κατὰ τε πόλεις,

Ὅπταν εὐρεῖν θέλωσι καιρόν.

Nunquam gemina de matre genus,

Nunquam duplices laudabo toros,

Odi et diræ semina rixæ.

Unam debet non ambigui

Vir participam nomen cubilis:

Duo nec domini rectius urbes

Terræque regunt, quam quæ sceptrum

Tenet una manus: quin sic oneri

Onus accedit: discors agitat

Rabies rupto federe cives.

Etiam artifices carminis inter

Geminos ipse tristia miscent

Prælia Musæ: cumque in pelago

Vela carinæ fert aura levís,

Plus una valet, contempta licet,

together; thus taking, from that condition which is best and most agreeable to God, matter most worthy of the new law.

4 It is certain that in ancient times most nations used both the liberty of divorce and also plurality of wives. Tacitus notices that the Germans were, in his time, almost the only barbarians who were content with single wives: and that appears constantly in the histories of the Persians and the Indians. Among the Egyptians, the priests alone had only one wife. In Greece, Cecrops was the first who gave one wife to one husband. And if any peoples had a more continent practice, as the Romans always abstained from two wives, and long from

diu observatum, Socratis et aliorum exemplo docemur. Quod Gell. xv. 30.
 si qui populi continentius egerunt, ut Romani semper duabus
 uxoribus, divortio diu abstinerunt, laudandi sunt sane, ut qui
 ad id quod optimum est accesserint: unde et flaminicæ apud
 eosdem Romanos matrimonium, nisi morte, non solvebatur:
 non tamen inde sequitur peccasse, qui fecerunt aliter ante
 promulgatam Evangelii vocem.

X. 1 Nunc quæ rata sint jure naturæ conjugia videa-
 mus: in quo dijudicando meminisse debemus, non omnia, quæ
 juri naturæ repugnant, irrita fieri jure naturæ, ut exemplo
 prodigæ donationis apparet; sed ea demum, in quibus deest
 principium dans validitatem actui, aut in quibus vitium durat
 in effectu. Principium et hic, et in aliis actibus humanis, unde

Dextera clavi quæ freno tenet,
 Quam consilii vis in partes
 Distracta duas, aut prudentum
 Numerosa cohors: una potestas
 Temperet urbem, regat una domum,
 Si modo cordi est tranquilla quies.

Plautus *Mercatore* (iv. 6. 8):

Nam uxor contenta est, quæ bona est, uno viro.
 Qui minus vir una uxore contentus siet?

o *Jam tunc imperatum*] Sic et in
 causa plarium uxorū distinguit Am-
 brosius id, quod laudaverat in paradiso
 Deus, a damnatione contrarii c. iv. Lib.
 i. de *Abraham*. quem locum Gratianus
 posuit causa xxxii. quest. iv. c. 3.
 [Vide quæ diximus in Tractatu Gal-
 lico *De Doctrina Morali Patrum Ec-
 cles.* cap. xiii. § 10, et seqq. J. B.]

p *Tum Indorum*] Et Thracum, de
 quibus versus sunt Menandri, (apud
 Strab. Lib. vii. p. 297) et Euripidis in
Andromacha. (vers. 214. et seqq.)

q Vide STRABONEM, *Geograph.* Lib.

xv. pag. 714. J. B.

q *Apud Egyptios soli sacerdotes*
 Vide Herodianum libro ii. [Sine dubio
 Herodianus, apud quem nihil quod ad
 rem faciat, positus est heic pro Hero-
 doto, undecumque error ortus fuerit.
 At hic contrarium plane docet, nimirum
 omnes Egyptios una uxore contentos
 fuisse, quemadmodum in more erat
 Græcis: Καὶ γυναῖκι μὴ ἕκαστος αὐ-
 τῶν συνοικίει, κατὰ πᾶρ Ἕλληνας. Lib.
 ii. cap. 92. Utri credemus? Herodoto,
 an Diodoro Siculo, ita inter se pugnan-
 tibus? J. B.]

r *Non tamen inde sequitur peccasse*
 Augustinus libro xxii. c. xlvii. contra
Faustum: Quando mos erat, crimen non
 erat. Posuit et hoc Gratianus, sed sub
 Ambrosii nomine. (Caus. xxxii. Quest.
 iv. c. 7).

s *Ubi actus turpitudine est permanens*,
 ait Auctor Adnot. in Matth. xxii. 30.

divorce, they are to be praised as having made an advance to what was
 best. Hence also the wife of the Flamen Dialis, the priestess of Ju-
 piter, could not have her marriage dissolved but by death. Yet still
 it does not follow that they sinned, who did otherwise before the pro-
 mulgation of the Gospel.

X. 1 Let us now see what marriages are valid by Natural Law:
 in deciding which, we are to recollect that not everything which is
 contrary to the Law of Nature [that is to the moral nature of man]
 is void by Natural Law; as appears by the example of a prodigal
 donation: [which is contrary to the natural virtue of prudence, and

jus oritur, est jus illud, quod facultatem moralem interpretati sumus, simul cum voluntate sufficiente. Quæ voluntas sit sufficiens ad jus producendum, infra melius tractabitur, ubi de promissis in genere agetur. Super facultate morali quæstio oritur de parentum consensu, quem ad validitatem conjugii quasi naturaliter quidam requirunt. Sed in eo falluntur. Nam quæ adferunt argumenta, nihil aliud probant, quam officio filiorum conveniens esse, ut parentum consensum impetrent: quod plane concedimus cum temperamento, nisi manifeste iniqua sit parentum voluntas. Nam si in omnibus rebus filii reverentiam parentibus debent, certe præcipue eam debent in eo negotio, quod ad gentem totam pertinet, quale sunt nuptiæ. Sed hinc non sequitur jus illud, quod facultatis aut dominii nomine explicatur, deesse filio. Nam qui uxorem ducit, et maturæ esse debet ætatis, et extra familiam abit, ita ut hac in re regimini familiari non subjiciatur. Solum autem reverentiæ officium non efficit, ut nullus sit actus qui ei repugnat.

Exemplum est in eo, qui rem alienam furatus est, aut mala fide possidet alio quocumque modo: quamdiu enim illam retinet, aut illa utitur, singuli actus habent contractationem rei alienæ. *J. B.*

* *Mater, cui tamen naturaliter liberi reverentiam debent, suo dissensu matrimonium irritum non facit*] Imo et avi,

si is liber est, voluntas plus valet quam patris, qui servilis sit conditionis. Gratian. causa 32. questione iii. c. unic.

† *Quarum verecundia maxime convenit hac in re alieno arbitrio stare*] Non est enim virginæ pudoris eligere maritum, ait Ambrosius Lib. 1. de Abraham. c. ult. relatus in codice Gra-

yet valid.] Those acts only are invalid, in which there is wanting a principle giving validity to the act, or in which the vice continues in its effect. The Principle, both here and in other human acts in which Right is created, is, that which we have called a moral Faculty or jural claim, joined with a sufficient Will.

What sort of Will is sufficient to create a Right, will be better treated further on, where we speak of promises in general. With regard to the jural claim, a question arises concerning the consent of parents, which some require as naturally requisite to the validity of marriage. But in this they are wrong; for the arguments which they adduce only prove how suitable it is to the duty of sons to obtain the consent of their parents: which we concede without hesitation, with this limitation only, that the will of the parents be not manifestly unjust. For if sons owe in all things a reverence to parents, they do so especially in a matter which has a national bearing, as is the case with marriage. But this does not shew that the right which we call a jural claim is not possessed by the son. For he who marries a wife ought to be of mature age; and he goes out of the family, so that in

2 Quod autem a Romanis aliisque constitutum est, ut quædam nuptiæ, quia consensus patris deficit, irritæ sint, non ex natura est, sed ex juris conditorum voluntate. Nam et eodem jure mater, cui tamen naturaliter liberi reverentiam debent, suo dissensu matrimonium irritum non facit; ac ne pater quidem filii emancipati: et si pater ipse sit in patris sui potestate, in filii nuptias et avus et pater consentire debent: filiæ avi auctoritas sufficit: quæ discrimina naturali juri incognita satis ostendunt venire hæc ex jure civili.

Lib. xxv. D.
de Rit. Nupt.
Lib. xvi. § 1.
De eod. Tit.

3 In sacris literis videmus quidem pios viros, multoque magis mulieres, (quarum verecundiæ maxime convenit hac in re alieno arbitrio stare, quo et illa pertinent quæ priore ad Corinthios de elocanda virgine legimus) in contrahendis nuptiis secutos auctoritatem parentum: sed non tamen irritum pronunciaturs Esau conjugium, aut liberi illegitimi, quia sine tali auctoritate nuptias contraxerat. Quintilianus, jus strictum, et quidem naturale, respiciens, sic ait: *Quod si licet ali-*

L. xx. C. de
Nupt.

vii. 38.

Gen. xxix. et
xxxvi.

Decl. 257.

tiani causa xxxi. questione II. c. 13.
Donatus *Andria* (iv. 4. 2): *Summa potestas nuptiarum in patre puella est.*
Hermione apud Euripidem (*Androm.* vers. 987):

Νυμφευμάτων δὲ τῶν ἐμῶν πατὴρ ἔχει
Μήτηρ μὲν ἔχει, κοῖνὸν ἔχουσιν ἀπὲρ τὰς.

Curam parenti de meis ego nuptiis
Permitto, non est illud arbitrii mei.

Hero apud Musæum (vers. 179, 180):

Ἀμφαδὼν οὐ δύναμεσθα γάμοις ὀνόισι πελάσσειν.

Οὐ γὰρ ἐμοῖς τοκέσσιν ἐπεισέδω.

Lege maritali jungi non possumus ambo,
Cum nolit mater, nolit pater.

this matter he is not subjected to the family government. And the duty of reverence alone does not make null an act which is contrary to it.

2 The rule established by the Romans and others, that certain marriages, because the consent of the father is wanting, shall be void, is not a rule of Natural Law, but depends on the Will of the lawgiver. For under the same rule, the mother does not make the marriage void by her dissent; though the children by nature owe obedience to her; nor does the father, after his son is emancipated; and if the father be still under the authority of his father, both the father and the grandfather must consent to the nuptials of the son, while for the daughter, the authority of the grandfather is sufficient; which differences, unknown to Natural Law, shew sufficiently that these rules come from the Civil Law.

3 In the Scripture we see indeed that pious men, and much more women, (whose modesty makes it suitable for them to act on another's will in this matter; to which view also pertains what is said 1 Cor. vii. 38, *He that giveth her in marriage, &c.*) have, in contracting matri-

quando etiam contra patris voluntatem ea, quæ alioqui reprehensionem non merentur, filio facere; "nusquam tamen libertas tam necessaria quam in matrimonio est.

XI. Cum ea quæ alteri nupta est matrimonium haud dubie irritum est, lege quidem naturæ, nisi vir prior eam dimiserit; tamdiu enim durat ejus dominium: lege autem Christi, donec mors vinculum dissolverit. Irritum autem est ideo, quia et facultas moralis deest, sublata per prius matrimonium, et omnis effectus est vitiosus. Singuli enim actus contractationem habent rei alienæ. Vicissim ex Christi lege irritum est conjugium cum eo, qui maritus sit alterius mulieris, ob jus illud quod Christus feminæ pudicitiam servanti dedit in maritum.

XII. 1 De conjugii eorum, qui sanguine aut affinitate junguntur, satis gravis est quæstio, et non raro magnis motibus

▪ *Nusquam libertas tam necessaria est quam in matrimonio*] Eugraphius ad *Andriam* actu x. scena v. *Tangitur et illud, an patrum imperiis obsequi filii debeant. Constat enim circa nuptias esse filii liberam voluntatem. Cassiodorus VII. 40. Durum est libertatem liberam non habere [in matrimonio], unde liberi procreantur.*

▪ *Plutarchus attulit in questionibus Romanis*] Philo de *Legibus Specialibus* (pag. 780): τὶ δὲ τὰς πρὸς τοὺς ἄλλους

ἀνθρώπους κοινωνίας καὶ ἐπιμιξίας ἐπέχειν, εἰς βραχὺ χωρὶον τὸ ἐκάστης οἰκίας συννοοῦντας μέγα καὶ λαμπρὸν ἔργον, ἐκτείνεσθαι καὶ χεῖσθαι δυνατόν ἐν εἰς ἡτέρους καὶ νήσους καὶ τὴν οἰκουμένην πᾶσαν; αἱ γὰρ τῶν ὀθνείων ἐπιγαμίαι καὶνὰς ἀπεργάζονται συγγενείας, τῶν ἀφ' αἵματος οὐκ ἀποδοῦσαι, ὧν χάριν πολλὰς καὶ ἄλλας ὁμιλίας ἐκώλυσε. Quid opus hominibus inter se necessitudines ac vincula inhibere, et unius domus angustiis claudere

mony, conformed to the authority of their parents. Yet Esau's marriage [who took his wives of the daughters of Canaan, in spite of his father's disapprobation, Gen. xxviii. 8; xxxvi. 2] is not pronounced void, or his children illegitimate. So Quintilian, looking at strict Natural Law. [See.]

XI. Marriage with a woman already married to another, is doubtless void by Natural Law, except her former husband have dismissed her; for so long his authority over her continues. It is void because the jural claim is wanting, being taken away by the former marriage, and the whole effect [of the second marriage] is vicious. Every act connected with it is a trespass on what belongs to another.

On the other hand, by the law of Christ, marriage with him who is the husband of another woman is void, on account of the right which Christ has given a virtuous wife over her husband.

XII. 1 The question concerning the marriage of those who are connected by blood or affinity is sufficiently grave, and not unfre-

agitata. Nam causas certas ac naturales, cur talia conjugia, ita ut legibus aut moribus vetantur, illicita sint, assignare qui voluerit, experiendo discet, quam id sit difficile, imo præstari non possit. Nam quam ^{Quæst. 108. p. 239 D.} Plutarchus attulit in quæstionibus Romanis, et Augustinus sequitur de Civitate Dei, libro xv. cap. 16. de latius spargendis amicitiiis per diffusas affinitates, non tanti est ponderis, ut quod contra fiat irritum aut illicitum censeri debeat. Neque enim quod minus utile est, statim et illicitum est. Adde quod accidere potest, ut huic qualicunque utilitati alia major utilitas repugnet, neque eo duntaxat casu quem Deus in lege Hebræis data excepit, ubi vir quispiam sine prole obiit, cui non dissimile est, quod de virginibus ex asse heredibus, quas ἐπικλήρους vocant, et Hebræo ^{et Attico} jure constitutum est, ad conservandas scilicet in familia res avitas, sed aliis multis qui aut conspici solent, aut excogitari possunt.

tam ingens ac præclarum opus, quod extendi fundique potest in regiones et insulas, orbemque universum? Affinitates namque cum extraneis novas pariunt conjunctiones hominum, non minores illis, quæ e sanguine veniunt: quod respiciens Moses alias etiam multas propinquorum nuptias vetuit. Chrysostomus ad 1 Corinth. xiii. 13. τί στενοχρεῖς τῆς ἀγάπης τὸ πλάτος; τί περιττῶς ὑπόθεσιν διαλίσκεις εἰς αὐτὴν φιλίας, δι' ἣν δύνασαι καὶ ἐτέραν πορίσασθαι

φιλίας ἀφορμὴν ἔξωθεν γυναικα ἀγαγών. Quid in arcum cogis amoris latitudinem? quid supervacuo amicitie causam perdis, per quam poteras aliam amicitie parandæ occasionem acquirere, extraneam ducendo uxorem? [Tom. iii. pag. 469.]

^{Et Attico jure} Vide Demosthenes ad Leocharem: Fortunatianum rhetoricum: Donatum Phormione act. i. scen. ii. (vers. 75), et Adelphis iv. 5. 17.

quently stirred with great vehemence. For if any one tries to assign certain and natural causes why such unions, in the cases in which they are forbidden by law or by usage, are unlawful, he will find that that is difficult, and indeed impossible. For the reasons given by Plutarch and Augustine [see], that social ties are to be extended more widely by diffusing our relationships, is not of such weight that what is done against it can be deemed void or unlawful. For that which is the less useful of two courses, is not thereby forthwith unlawful. Add, that it may happen that whatever the amount of utility on this side be, it may be outweighed by a greater utility on the other side; and that, not only in the case of exception mentioned in the Hebrew Law, when a man dies without offspring, (which is of the same kind as the rule about heiresses in the Hebrew and Attic law,) namely to preserve the property of the family in the family; but also in many other cases, which occur or may be imagined.

2 Ab hac generalitate eximo matrimonia parentum cujuscunque gradus cum liberis, quæ quo minus licita sint, ratio (ni fallor) satis apparet. Nam nec maritus, qui superior est lege matrimonii, eam reverentiam potest præstare matri quam natura exigit, nec patri filia; quia quanquam inferior est in matrimonio, ipsum tamen matrimonium talem inducit societatem, quæ illius necessitudinis reverentiam excludat. Bene Paulus Jurisconsultus, cum dixisset in contrahendis matrimoniis "naturale jus et pudorem inspiciendum, addidit contra pudorem esse filiam suam uxorem ducere. Talia igitur conjugia haud dubitandum quin et illicita sint, et irrita insuper, quia vitium perpetuo effectui adhæret.

L. *Adoptivus*,
14. § *Servilis*,
3. D. de *Rit.*
Nupt.

3 Neque movere nos debet Diogenis et Chrysippi argumentum, a gallis gallinaceis aliisque animantibus mutis peti- tum, quo probare volebant commixtiones tales non esse contra jus naturæ. Nam, ut initio libri diximus, satis est, si cum natura humana quid pugnet, ut illicitum habeatur. Et hoc est incestum, quod "jure gentium committi scripsit Paulus jurisconsultis inter gradus ascendentium et descendantium. Hoc est jus illud quod Xenophon ait non eo minus jus esse,

L. *ult. de*
Rit. Nupt.

Socrat. *Mem.*
iv. 4. §§ 19,
20.

■ *Naturale jus et pudorem inspicien- dum*] Egrege hoc exsequitur Philo de *Specialibus Legibus*; ubi esse dicit μέ- γιστον ἀνοσιούργημα, maximum nefas, πατρός εὐνήν τετελευτηκότος, ἣν ἀ- ψαυστον ὡς λερὰν ἐχρῆν φυλάττεσθαι, καταισχύνειν, γήρως δὲ καὶ μητρός αἰδῶ μὴ λαμβάνειν, τὸν αὐτὸν τῆς αὐτῆς υἱὸν καὶ ἀνδρα γενέσθαι, καὶ πάλιν τὴν αὐτὴν νῦν μητέρα καὶ γυναῖκα. *Patris mortui cubile, quod, tanquam res sacra,*

intactum sibi oportuit, contemnerare, neque senectutis neque materni nominis verecundia tangi, eundem ejusdem esse filium et maritum, eandem ejusdem matrem et uxorem. (Pag. 778 c. *Edit. Paris.*)

■ *Jure gentium*] Sic et Papinianus loquitur in L. *Si Adulterium*. 38. § 2 D. *ad legem Juliam de Adulteriis*.

■ *A Persis contemnebatur*] Quorum hac in re crimen bellis perpetuis, ac

2 From this general remark, I except the union of parents of any degree with their children; for, if I am not deceived, the reason why such unions are unlawful is apparent. For the husband, who is the superior by the law of matrimony, could not pay to his mother (being his wife) the reverence which nature requires; nor could a daughter to a father; for though she is inferior in the marriage union, yet the marriage introduces a companionship which excludes filial reverence. Paulus the Jurist says that Natural Law and modesty are to be regarded in contracting marriage, and adds, that it is against modesty for one to have his own daughter to wife. Such marriages, then, are both unlawful, and also void, because the vice has a per- petual effect.

quia ^b a Persis contemnebatur. Naturale enim recte dicitur, interprete Michaelē Ephesio ad Nicomachia, τὸ παρὰ τοῖς πλείστοις καὶ ἀδιαστρόφοις καὶ κατὰ φύσιν ἔχουσιν: *quod apud plerosque non corruptos, sed naturæ convenienter se habentes obtinet.* Hippodamus ^cPythagoricus vocat παρὰ φύσιν ἀμέτρους ἐπιθυμίας, ἀκατασχέτους ὁρμὰς, ἀνοσιωτάτας ἀδονάς, *immoderatas et a natura alienas cupiditates, effrænes impetus, nefarias voluptates.* De Parthis sic Lucanus [Lib. viii. vers. 401, et seqq.] :

Epulis vesana, meroque
Regia, non ullos exceptos legibus horret
Concubitus.

Et mox (vers. 409, 410):

Cui fas implere parentem,
Quid rear esse nefas?

Speciatim autem huic Persarum mori causam pravam educationem prudenter assignat Dion Prusæensis oratione xx.

4 Atque hic mirari libet Socratis commentum apud Xenophontem, qui in conjugis talibus nihil culpandum invenit, præter ætatis disparitatem: unde aut sterilitatem ait sequi,

*Immo xxi.
p. 370 c.
Memor. iv. 4
§ 22.*

fratrum cædibus, a Deo punitum notat Philo. (*De Special. Legib.* pag. 779). Persis addit Medos, Indos, Æthiops, Hieronymus Lib. ii. *contra Jovinianum*. (Pag. 75. Tom. ii.) de barbaris in universum Hermione in *Andromacha Euripidis* (vers. 173. et seqq.):

—Τοιούτων πᾶν τὸ βάρβαρον γένος.
Πατήρ τε θυγατρί, παῖς τε μητρί μίγνυνται,
Κόρη τ' ἀδελφῇ. διὰ φόνον δ' οἱ φίλτατοι
Συρούσι, καὶ τῷδ' οὐδὲν ἱερίον νόμος.

Tale est omne barbaricum genus.
Mater jugatur filio, nate pater,
Fratrē sorori: proxime alterna manus
Cæde implicantur: nulla lex prohibet nefas.

^d Non, sed alius Philosophus ejusdem sectæ, nomine Hipparchus, in libro *de Animi Tranquillitate*, cujus fragmentum nobis servavit STOBÆUS. Repertur illud etiam in *Opusculis Mythol. Phys. Ethic.* editis *Amstelod.* 1688. ubi locum, de quo agitur, leges pag. 670. J. B.

3 Nor need we be moved by the argument of Diogenes and Chrysippus, taken from cocks and hens, and other animals; by which they try to prove that such unions are not against Natural Law. For, as we have said in the beginning of this Book, it is enough, if anything is contrary to human nature, to prove it unlawful. And Incest between ascending and descending degrees is so. So Paulus, Xenophon, Michael Ephesius, Hippodamus, Lucan, Dio Prusæensis.

4 And here we cannot but wonder at the reasoning of Socrates in Xenophon, who finds nothing to blame in such marriages but the disparity of years, whence must follow either barrenness, or an ill-formed progeny. If this reason alone were the obstacle, certainly such unions would be neither unlawful nor void; any more than between other

aut male conformatam sobolem : quæ sola ratio si tali conjugio obstaret, certe nec irritum esset, nec illicitum, non magis quam inter alias personas, quarum ætas tot annis distat, quot annis parentes liberos solent præcedere.

5 Illud potius disquirendum, an non in hominibus nulla prava educatione corruptis, præter id quod intellectu concipi posse jam diximus, sit in ipsis affectibus insita fuga quædam commixtionis cum parentibus et ex se natis, quippe cum ab ea etiam quædam animantia muta naturaliter abhorreant. Ita enim et alii existimarunt, et Arnobius *adversus Gentes* libro quinto : *Etiamne in matrem cupiditatis infandæ spem Jupiter cepit, nec ab illius appetitionis ardore horror eum quivit avertere ; quem non hominibus solis, sed animalibus quoque nonnullis natura ipsa subjecit, et ingeneratus ille communiter sensus ?* Exstat de camelo et de equo Scythico nobilis in hanc rem narratio apud Aristotelem animantium historia nona, capite XLVII. et non dissimilis apud Oppianum libro primo de *Venatu*. Seneca Hippolyto (vers. 914, 915) :

Feræ quoque ipsæ Veneris evitant nefas,
Generisque leges inscius servat pudor.

XIII. 1 Sequitur quæstio de gradibus affinitatis omnibus et de gradibus sanguinis ex transverso limite, iis præser-

c *De equo*] Plinius *Historia Naturalis* VIII. 42. ubi de equis agit, *Alium detracto oculorum operimento, et cognito cum matre coitu, petiisse prærupta atque exanimatum. Equæ et eadem ex causa in Reatino agro laceratum pro-*

rigam invenimus. Namque et cognationum intellectus in iis est. Habes paria apud Varronem de Re Rustica II. 7. et apud Antigonum de Admirabilibus, (cap. 59). Aristotelemque ejusdem tituli libro. [Pag. 1150 B, c. Tom. I.

persons whose ages are as different as those of parents and their children usually are.

5 We are rather to consider whether, in men not depraved by education, there is not, besides the reason given by the understanding, a certain horror of such union with parents and offspring, residing in the affections themselves; since even some animals have such a horror. So many have thought: Arnobius; Aristotle of the camel, and the Scythian horse; Oppian; Seneca in the Hippolytus.

XIII. 1 We must next consider the question concerning the degrees of affinity, and the degrees of consanguinity in a transverse line; especially those which are expressly mentioned, Levit. xviii. For though we should grant that these interdicts do not proceed from the mere Law of Nature, yet in virtue of the Divine precept, these unions may pass among forbidden things. And that the precept is one which

tim qui Levitici, cap. xviii. expressi leguntur. Nam etiam concessio, a mero jure naturæ non venire hæc interdicta, videri tamen possunt præcepto divinæ voluntatis hæc ivisse in vetitum: neque vero tale id esse præceptum quod solos Hebræos adstringat, sed quod homines universos, colligi videtur ex illis Dei verbis apud Mosem: *Ne polluere vos ulla harum rerum: quia omnibus istis polluti sunt populi, quos vobis advenientibus dispello.* Mox: *Ne facite ullam ex istis rebus abominandis: nam omnes istas fecerunt indigenæ terræ istius, quæ vobis exposita est, unde polluta est terra.* Lev. xviii. 24, 25, 27.

2 Nam si Cananæi eorumque vicini peccarunt talia faciendo, sequitur ut lex aliqua præcesserit: quæ cum mere naturalis non sit, restat ut a Deo data sit, aut ipsis peculiariter (quod non est verisimile, nec satis ferunt verba) aut humano generi, sive in prima constitutione, sive in reparatione post diluvium. Tales autem leges, quæ humano generi universo sunt datæ, non videntur a Christo abrogatæ, sed eæ demum, quæ Judæos aliis nationibus, quasi sepimento interjecto, dis- Ephes. ii. 14. parabant. Cui accedit, quod Paulus conjugium privigni cum 1 Cor. v. 1. noverca tam severe detestatur: cum tamen nullum de ea re peculiare exstet Christi præceptum; nec ipse alio utatur argumento, quam quod talis commixtio ^dimpura habeatur a pro-

At vide SELDENUM, *De Jure Nat. et Gent. secund. discipl. Hebræor.* Lib. 1. cap. 5. J. B.]

^e Auctor ipse istius argumenti totam vim infringit paullo post, observatione quæ legitur in § sequ. num. 2.

J. B.

^d Impura habeatur a profanis etiam gentibus] Tertullianus v. adversus Marcionem: Non defendo secundum legem Creatoris displicuisse illum, qui mulierem patris sui habuit: communis et pub-

does not bind the Hebrews only, but all men, seems to be collected from the words of God, Lev. xviii. 24, 25, 27, *Do not ye pollute yourselves, &c.*

2 For if the Canaanites and their neighbours sinned in doing such things, it follows that some law of God on that subject must have gone before; and as this is not merely a Natural Law, it remains that it was from God, either given to those nations peculiarly, (which is less probable, nor do the words carry that meaning,) or to the human race; either at the Creation, or at the restoration of things after the Deluge. And such laws, which were given to the whole human race, were not, it appears, abrogated by Christ; but those laws only which separated the Jews from other nations. Add to this, that Paul speaks of the marriage of a man with his father's wife as something shocking, though there is no special precept of Christ on that subject; nor

cap. 6.

VII. Demetr.
p. 307.

fanis etiam gentibus, quod veram esse præter alia ostendunt Charondæ leges, quæ tale matrimonium infamia notant: et illud in oratione Lysæ: ¹συνῆκει ὁ πάντων σκολιώτατος ἀνθρώπων τῇ μητρὶ καὶ τῇ θυγατρὶ, *maritus erat ille impurissimus hominum matris ac filiae*: unde non abit Cicero illud pro A. Cluentio in causa non dissimili: nam cum socrum genero nupsisse narrasset, subdit: *O mulieris scelus incredibile, et præter hanc unam in omni vita inauditum!* Seleucus rex cum uxorem suam Stratonice Antiocho filio nuptam daret, verebatur, ²narranta Plutarcho, ne ipsa offenderetur τῷ μὴ νενομισμένῳ, *ut re illicita*. Apud Virgilium est (*Æn.* x. 389:)

Thalamos ausum incestare novercæ.

Quæ communis existimatio si a necessario naturæ dictato originem non habuit, omnino sequitur, ut descendat ex veteri traditione, quæ a divino aliquo præcepto manarit.

3 Hebræi veteres, non spernendi hac in parte juris divini interpretes, et qui omnia eorum legit summoque judicio digessit Moses Maimonides, aiunt earum legum, quæ capite Levit. xviii. de matrimoniis sunt proditæ, causas esse duas: priorem naturalem quandam verecundiam, quæ non sinat or-

licæ religionis secutus sit disciplinam. (Cap. 7).

¹ Non sunt Lysæ verba illa, sed Anodocidis, *Orat.* i. pag. 235. *Edit. Hanov.* 1619. J. B. [Ceterum Charondam non vetuisse privignum novercæ conjungi, sed viduum uxore mortua liberis novercam superinducere notat ad h. l. Gro-

novius, quem sequitur J. B. erroris origine patefacta.]

² *Narranta Plutarcho*] In *vita Demetrii*: sed et Appiano in *Syriacis*, qui ἀθεμιστίας πᾶθους amorem nefandum vocat. (Pag. 126.)

³ *Aut etiam per personas sanguine aut nuptiali sanguinis commixtione coheren-*

does he use any other argument than that such a union is held to be impure even by the heathen. And that it is so appears in ancient authors. So Charondas; Lysias; Cicero; Plutarch; Virgil. And if this common opinion was not drawn from a dictate of nature, it follows that it descends from an old tradition originating in a divine precept.

3 *The ancient Hebrews, who are not to be thought slightly of as commentators on this part of the divine law, and especially Maimonides, the greatest of them, says that there are two reasons for these laws, given Lev. xviii., concerning marriage: First, a natural modesty which does not permit persons to mingle with their own offspring, either in themselves, or in persons closely connected by blood or by marriage union: Second, lest the daily and confidential intercourse of certain

* For the reasons against marriages of near relations, see *Elements of Morality*, 749 and 980.

tus auctores cum sua sobole, aut in se ipsis, aut etiam per personas sanguine aut nuptiali sanguinis commixtione proxime coherentes misceri: alteram vero, ne quarundam personarum convictus nimis quotidianus atque inobservatus stupris et adulteriis occasionem daret, si amores tales nuptiis possent conglutinari. Quas duas causas si cum judicio aptare velimus illis quas dixi divinis in Levitico legibus, facile apparebit in affinibus, qui in recto sunt limite (ut de parentibus et liberis nihil jam dicam, quippe quos, ut existimo, etiam sine expressa lege ratio naturalis jungi satis vetat) item in sanguinis gradu transversorum primo, qui ob ortum a stirpe communi secundus dici solet, ob recentem admodum parentum in liberis imaginem, priorem causam valere, ut venientem de eo quod natura si non præcipit, certe honestius dictat; cujus generis multa materiam divinarum humanarumque legum faciunt.

4 Atque ideo Hebræi in recto limite, gradus etiam non nominatos a lege volunt comprehendere, ob notissimam rationis paritatem. Istorum autem graduum hæc sunt apud ipsos nomina: Mater matris suæ: mater patris matris suæ: mater patris sui: mater patris patris sui: uxor patris patris sui: uxor patris matris suæ: nurus filii sui: nurus filii filii sui:

tes] Philo: ἀδελφὰ δὲ εἰ καὶ διαίρετα τὰ μέρη γέγονασιν, ἀλλ' οὖν ἀρμόζονται τῇ φύσει καὶ συγγενείᾳ μὴ. *Quantum enim divisæ sunt partes, fraternitatis jus retinent, ac cognatione, ut naturali vinculo, junguntur.* [Locus est *De Legib. special.* pag. 780 E. Sed qui,

si bene expendatur, nihil ad rem facere deprehendetur. *J. B.*]

* Item in sanguinis gradu transversorum primo] Et huc usque propinquis nuptiis abstinebant et Peruani, et Mexicani. [Vide Joann. Letii *Itinerar.* Cap. 17. init. *J. B.*]

persons should give occasion to sexual union, if such union could be confirmed by marriage. Which two causes if we judiciously apply to the laws given in Leviticus, it will easily appear that in the first transverse degree of blood, (brothers and sisters,) on account of the very recent image of the parents in the children, the first cause holds, as proceeding from that which, if nature does not command, at least she points out as more becoming: as there are many such things, which make the matter of divine and human laws.

4 Hence the Hebrews say that in the direct line the degrees not named in the law are comprehended, from the manifest parity of reason. These degrees they thus reckon: mother's mother; mother's father's mother; father's mother; father's father's mother; father's father's wife; mother's father's wife; son's daughter-in-law; son's son's daughter-in-law; daughter's daughter-in-law; son's daughter's daughter; son's son's daughter; daughter's daughter's daughter;

nurus filiæ suæ: filia filiæ filii sui: filia filii filii sui: filia filiæ filiæ suæ: filia filii filiæ suæ: filia filiæ filii uxoris suæ: filia filiæ filiæ uxoris suæ: mater matris patris uxoris suæ, mater patris matris uxoris suæ: id est, ut more loquar Romano, aviæ et proaviæ omnes, pronovercæ, proneptes, propri-vignæ, pronurus, prosocrus: quia scilicet et sub agnationis nomine comprehendatur similis cognatio, et sub primo gradu secundus, et sub secundo tertius, ultra quem vix est ut oriri controversia possit, cum alioqui, si posset, in infinitum eadem futura esset ratio.

5 Has autem leges, et ne fratres sororibus miscerentur, ipsi Adamo censent datas Hebræi simul cum lege de Deo colendo, jure dicendo, non fundendo sanguine, non colendis Diis falsis, non rapienda re aliena: sed ita ut leges conjugales vim suam non exsererent, nisi post multiplicatum jam satis humanum genus, quod ipso initio sine fratrum et sororum nuptiis contingere nequivit. Neque referre putant quod id a Mose^h suo loco narratum non sit: quia satis habuit hoc in lege ipsa tacite indicasse, cum gentes extraneas eo nomine damnat. Multa enim talia esse in lege, quæ non temporis ordine, sed ex occasione dicantur: unde illa inter Hebræos celebris sententia: in lege non esse prius aut posterius, id est, multa referri ὕστερον πρότερον.

^h *Suo loco narratum non sit*] Nam neque lex illa narrata est, ex qua Judas Thamarem comburi voluit. Sic Sichemitas Judith recte occisos ait, quod virgini stuprum intulissent, ix. 2. et Ruben patris maledicto feritur ob incestum.

[Ex his omnibus non potest tuto colligi, aliquam legem a Deo fuisse latam de adulterii aut raptus pœna, vel de incestu. Diximus in Notis Gallicis. J. B.]

^{*} Locus est apud AUGUSTINUM, *De Civit. Dei* Lib. v. c. 10. nimirum scrip-

daughter's son's daughter; wife's son's daughter's daughter; wife's daughter's daughter's daughter; wife's father's mother's mother; wife's mother's father's mother: which the Romans express in a different way. And so *in infinitum* if it could be necessary.

5 These laws, and the law against the marriage of brother and sister, the Hebrews think were given to Adam at the same time with the laws, to worship God, not to shed blood, to worship no false gods, not to take what is another's. But they think that the laws concerning the conjugal union were given so that they should not be in force till the human race was to a certain extent multiplied; which could not take place at first without the marriage of brothers and sisters. Nor do they think it any objection to this account, that it is not given in the narration of Moses; for he held it sufficient to indi-

6 De connubio fratrum et sororum verba hæc sunt Mi-
 chaëlis Ephesii ad quintum Nicomachiorum: τὸν ἀδελφὸν μίγ-
 νυσθαι τῇ ἀδελφῇ ἐξ ἀρχῆς μὲν ἀδιάφορον ἦν. νόμου δὲ
 τεθέντος μὴ μίγνυσθαι, πολὺ τὸ διάφορον. *Fratrem cum*
sorore concumbere ab initio res media erat: at, lege adver-
sus tales concubitus posita, jam multum refert, observetur
lex necne. Diodorus Siculus vocat κοινὸν ἔθος τῶν ἀνθρώπων, ^{Lfb. l. 27. p. 16.}
communem hominum morem, ne fratres sororibus jungantur,
 a quo more Ægyptios eximit: Dion Prusseensis barbaros.
 Seneca scripserat: ^{p. 538 a.} *Matrimonia Deorum jungimus, et ne pie*
quidem, fratrum scilicet et sororum. Plato de Legibus octavo
 talia conjugia vocat μηδαμῶς ὄσια, καὶ θεομυσῆ, *minime pia,*
sed Deo invisita.

7 Quæ omnia ostendunt veterem famam de lege divina
 adversus id genus conjugia, unde et vocem nefas de talibus
 usurpari videmus. Omnes autem fratres et sorores compre-
 hendi lex ipsa indicat, tam agnatos quam cognatos ejus gradus,
 sive foris, sive domi natos atque educatos comprehendens.

XIV. 1 Quæ manifesta expressio ostendere videtur dis-
 crimen, quod est inter hos et alios remotiores gradus. Nam
 ducere amitam agnatam vetitum est. At ^kfiliam fratris, qui
 par est gradus, ducere vetitum non est: imo ejus facti apud
 Hebræos extant exempla. *Nova nobis in fratrum filias con-*

to deperdito. J. B.

^l *Lex ipsa indicat*] Ubi vide Chal-
 dæum paraphrasten: distinxerunt male
 Spartiata, et Athenienses, et quidem
 diversimode. [Vide SELDEN. *De Jure*
Nat. et Gent. &c. Lib. v. cap. ii. et

Illustr. SPANHEMII *Commentarium in*
Orat. 1. Juliani Imp. pag. 89. et seqq.
J. B.]

^k *Filiam fratris ducere*] Talem Abra-
 hamo Saram fuisse Josephus putat.
 (*Ant. Jud. Lib. i. cap. xii. § 1. Edit.*

cate this tacitly, by condemning other nations on that ground: For
 that there are many things in the Law which are not told in the
 order of time, but as occasion offers; whence that noted maxim of the
 Hebrews, that in the Law there is no before and after.

6 On the union of brothers and sisters, see Michael Ephesius,
 Diodorus Siculus, Dio Prusseensis, Seneca, Plato.

7 All which passages shew the ancient opinion of a divine law
 against such marriages; whence we see they are called *nefas*.

XIV. 1 These manifest expressions shew what a difference there
 is between these and remoter degrees. For to marry a father's sister
 is forbidden; but a brother's daughter, who is in the same degree,
 it is not forbidden to marry; and there are examples of it among
 the Hebrews. So this was done at Romo and at Athens: See Tacitus,

Ann. xii. 6.
Vit. x. Orat.
p. 636 a.

jugia: at aliis gentibus solemnia, nec lege ulla prohibita, inquit Tacitus. Athenis id licuisse ostendit ³Isæus, et Lysiaë vita Plutarchus. Rationem adferunt Hebræi, quia viri juvenes assidue frequentant domos avorum et aviarum, aut etiam in iis habitant simul cum amitis: ad domos vero fratrum minus frequens ipsis est aditus, nec ibi tantundem habent juris. Quæ si recipimus, ut sane rationi sunt consentanea, fatebimur legem de non ducendis affinibus recti gradus, et sororibus, ex quo multiplicari cœptum est humanum genus, esse perpetuam: et hominibus communem, ut quæ honestate naturali nitatur, ita ut et irritum fiat, si quid factum sit adversus hanc legem, ob vitium permanens: at cæteras leges non item, ut quæ cautionem magis contineant, quæ cautio etiam aliis modis adhiberi potest.

Can. xviii.

2 Certe canonibus antiquissimis, qui apostolici dicuntur, qui duas sorores alteram post alteram duxisset, aut ἀδελφίδην, id est, fratris aut sororis filiam, tantum a clero arceatur. Nec difficilis est responsio ad id, quod diximus de peccato imputato

Hudson.) idem post datam legem exempla nobis dat in Herode, qui fratris filiam duxerat, et suam filiam fratri Pheroræ desponderat. Vide eum antiquæ historiæ xiv. et xvi. Phineo patris promissa Andromede; Ovidius *Metamorphoseon* v. vers. 10. id postea apud Romanos vetitum permisit Claudius: vetuit Nerva: permisit Heraclius.

[Non unus error in hac Nota. I. Fallitur omnino Josephus, dum vult Saram fuisse filiam fratris Abrahami. Illa erat soror ejus ἀγοράτριος, ut ipse ait Gen. xx. 12. ubi vid. Intt. II. Imp. Nerva, ubi vetuit ἀδελφίδην γαμεῖν, referente Xiphilino, pag. 241 A. Ed. Steph. *Filiam sororis*, non *fratris*, intelligebat. Vide Cujac. Obs. xiii. 16. et Clariss. Noort.

Isæus, Plutarch. The Hebrews give a reason, that young men usually frequent the houses of their grandfathers and grandmothers, or even live in them along with their aunts; but they have not the same access to the houses of their brothers, nor so much freedom there. If we accept this, as indeed it seems to be reasonable, we must confess that the law of not marrying relations in the right line, and sisters, since the human race was multiplied, is perpetual; and common to all men, as depending on natural decency; so that whatever is done against this law is void on account of the abiding vice of condition: but that the other laws are not so; but contain rather a caution than a law, which caution may also be applied in other ways.

2 Certainly in the ancient (so called) Apostolical Canons, he who married two sisters successively, or his niece (the daughter of his brother or sister) was only excluded from the clerical office. Nor is it difficult to answer what was said concerning the sin imputed to

Cananæis et finitimis populis. Potest enim locutio universalis restringi ad præcipua ejus capitula, ut de concubitu cum masculis, cum bestiis, cum parentibus, cum sororibus, cum nuptis alienis, in quorum *προφυλακὴν*, et, ut Hebræi loquuntur, præmunimentum, additæ sint leges cæteræ. Nam de singulis partibus ne intelligatur, argumento esse potest interdictum de non habendis eodem tempore in matrimonio sororibus duabus: quod in commune datum olim humano generi fuisse Jacobi pietas, qui contra fecit, credere nos non sinit. Addi potest factum Amrami, qui pater Moysi fuit. Nam et is ante legis tempora amitam duxit uxorem: sicut materteras ¹apud Græcos Diomedes et Iphidamas: Areten fratris filiam Alcinous.

*Eust. ad II.
xii. v. 22i.
Idem. in
Odys. vii. v.
146.*

3 Recte tamen fecerunt Christiani veteres, qui leges non illas tantum in commune datas, sed alias peculiariter Hebræo populo scriptas sponte sua observarunt: imo et ad gradus quosdam ultiores protenderunt verecundiæ suæ fines, ut hæc quoque in virtute non minus quam in ceteris Hebræos antecederent. Atque id pridem factum magno consensu ex cano-

Observ. II. 5. Hic etiam ibidem ostendit, neque post Senatusconsultum Claudianum in Provinciis licuisse filiam fratris ducere. III. Permissum id ab Heraclio, nescio cujus fide statuat Auctor. Ego reperio tantum, Imperatorem illum duxisse Martinam, fratris filiam, ut narrant Zonaras, Paulus Diaconus, &c. *J. B.*

² Nihil in hanc rem reperio apud Isæum. Forte Auctor in animo habuit DEMOSTHENEM, ex quo potest colligi, talem gradum vetitum non fuisse. Vide *Orat. adversus Leochar.* pag. 671 c. et *Orat. in Neeram*, pag. 517 c. *J. B.*

¹ *Apud Græcos*] Et Castori avunculo desponsam Electram ex Euripidis *Electra* discimus. (vers. 312).

the Canaanites and the neighbouring peoples. For the universal terms may be restricted to the principal heads: the *pollutions* of the Canaanites may be those which are mentioned Lev. xviii. 22, 23; and the other laws, concerning incest, are added as an outwork to these.

That the expressions cannot be understood of every part, we may see by the prohibition of having to wife at the same time two sisters, which we cannot suppose was a universal rule, since Jacob transgressed it. So Amram the father of Moses married his aunt, and among the Greeks, Diomedes married his mother's sister; Iphidamas, the same; Alcinoüs, his brother's daughter.

3 But the early Christians did well, who spontaneously observed, not only those Laws which were given as common to all, but also those peculiarly given to the Hebrew people; and even extended their modesty to other ulterior limits, so as to surpass the Hebrews in this virtue, as in other things. And it appears from the Canons that this was done. So Augustine says, that what was not forbidden, as marriage of

De Civ. Dei,
xv. 16.

Epist. 66.

nibus apparet. Augustinus ^mde patruelium et consobrinorum conjugii inter Christianos loquens: *Raro, inquit, per mores fiebat quod fieri per leges licebat, quia id nec divina prohibuit, et nondum prohibuerat lex humana: verumtamen factum etiam licitum propter vicinitatem horrebatur illiciti.* Hanc morum verecundiam leges regum ac populorum secutæ sunt: sicut ⁿTheodosii constitutio patruelium et consobrinorum conjugia vetuit, laudante id factum, ut pietatis plenum, Ambrosio.

4 Sed sciendum simul est, °non quod vetitum est fieri lege humana, si fiat, irritum quoque esse, nisi et hoc lex ad-diderit aut significaverit. Canon Eliberinus LX: Si quis post obitum uxoris suæ ^psororem ejus duxerit, et ipsa fuerit fidelis,

^m De patruelium conjugii] Æschylus Danaidibus. [Immo Supplicibus, [v. 38. ed. Dindorf.] ubi de Danaidibus] vocat λέκτρα ὧν θέμις εἶργει, cubilia quæ jus prohibet, et ait sic μιαινοσθαι γίνου, fœdari genus. At Scholiastes addit illegitimas fuisse tales nuptias, quod adhuc viveret virginum pater, quasi justæ futuræ fuerint eo mortuo, ex lege τῶν ἐπικλήρων. In oratione Sp. Ligustini civis Romani apud Livium est (Lib. XLII. c. 34): *Pater mihi uxorem fratris sui filiam dedit.* Vide et Plauti *Pænulum*. (V. 3. 37).

ⁿ Theodosii Constitutio] Victor de eo (Epit. c. 48): *tantum pudori tribuens et continentia, ut consobrinarum nuptias vetuerit, tanquam sororum.* Meminit et Libanius oratione *de Angariis*. Exstat Arcadii et Honorii lex ejusdem sensus, quæ tertia est C. Theodosiano de *Incestis Nuptiis*. Concedi tamen principum indulto solitas nuptias tales os-

tendit lex Honorii et Theodosii minoris alia eodem codice, titulo: *si nuptiæ ex rescripto petantur*. Secuti et Gotthi reges. Cassiodorus VII. 46: *Hoc prudentes viri sequentes exemplum, longius pudicam observantiam posteris trans-miserunt, reservantes principi tantum beneficium consobrinis nuptiali copulatione jugendis.* Ubi et formulam habes talis veniæ principalis. [Arcadius et Honorius, qui primo imperii anno patris sui Constitutionem firmarant, post annos aliquot, permiserunt matrimonium inter Consobrinos, et Constitutionem hac de re editam Justinianus in Codice suum retulit, L. 19. C. De Nuptiis. Vide Interpretes ad Instit. Tit. De Nuptiis, § 4. et præsertim magnum Interpretem Codicis Theodosiani, JAC. GORHOFFIUM, in titulos ab Auctore nostro indicatos. J. B.]

° Non quod vetitum est lege humana, si fiat, irritum quoque esse] In Aga-

cousins, was avoided, as approaching forbidden ground. And this feeling was followed by the laws. Theodosius forbade the marriage of cousins, and Ambrose praised him for doing so.

4 But it is to be understood that what is forbidden by human law is not necessarily void when it is done, except the Law so directs. The Canon LX. of Seville says, if any one after the death of his wife shall marry her sister, he shall be excluded from the Communion five years; thus shewing that the tie of matrimony remains. And as we have said, in the Apostolical Canons, he who married two sisters, or a niece, was

per quinquennium eum a communione abstinet: eo ipso ostendens manere vinculum matrimonii. Et ut jam diximus, in canonibus, qui Apostolici dicuntur, qui duas sorores duxerit, aut fratris filiam, tantum clericus fieri prohibetur.

XV. 1 Ut ad alia pergamus, observandum hoc est, concubinatum quendam verum ac ratum esse conjugium, etsi effectibus quibusdam juris civilis propriis privetur, aut etiam effectus quosdam naturales impedimento legis civilis amittat. Exempli causa, inter servum et ancillam jure Romano contubernium esse dicitur, ^qnon matrimonium: attamen ad ipsam conjugii naturam nihil deest in tali consociatione: quæ propterea in antiquis canonibus γάμος nomine appellatur. Sic inter hominem liberum et ancillam concubinatus dicitur, non matri-

thensi concilio post commemorata conjugia vetita, et inter ea de relicta fratris, additur: *Quod ita præsentis tempore prohibemus, ut ea, quæ hactenus sunt constituta, non solvamus.* Retulit id Gratianus in questionem II. et III. causæ xxxv. c. 8. Simile quod a Paulo in sententias relatum est libro II. tit. xix. § 2. sine parentum consensu contractas nuptias injustas esse, sic tamen, ut non dissolvantur; nisi forte hæc postrema verba Anianus addidit. Tertullianus de conjugio cum infidelis agens *ad uxorem secundo* (cap. 2), ait dominum magis ratum habere matrimonium non contrahi, quam omnino disjungi. Vide infra § xvi. [Apud Paulum vel legendum, vel subintelligendum, *sed contracta* (matrimonia scilicet) *voluntate ejus Parentis*] *non solvantur*, ut olim nimirum id fieri poterat. Vide omnino Notam Eruditissimi SCHULTZII in hunc

locum; qui proinde nihil ad rem facit. *J. B.*]

^p *Sororem ejus duxerit*] Lex Langobardica, Lib. II. c. viii. 3. *quia canones sic habent de duabus sororibus, sicut de duobus fratribus.*

^q *Non matrimonium*] At serviles conjunctiones nuptiæ dicebantur in Græcia, Carthagine, in Apulia. Prologus ad Casinam Planti. Sic et in legibus Langobardorum libro II. tit. xii. 10, et xiii. 3, et lege Salica tit. xiv. § 11, sed sine consensu dominorum non valuisse conjugia talia apud Hebræos, notatur ab ipsis ad Exodum xxi. ubi talium nuptiarum mentio, et apud Græcos Christianos, a Basilio in suis canonibus. (*Ad Amphilocho.* Can. 42.) Solitam etiam a principe veniam impetrari ducentis mulieris, quæ inæqualis esset conditionis, videmus apud Cassiodorum VII. 40.

only excluded from the Clergy.

XV. 1 To proceed to other matters, we may observe that, in some cases, concubinage is a true and valid marriage, although it be deprived of some of the peculiar effects of the Civil Law, and even lose some of its natural effects by the impediment of the Civil Law. For example, the union of a slave with a maid servant is, by the Roman Law, cohabitation, not marriage; but yet, in such a union, there is nothing wanting to the nature of marriage, which accordingly, in the old Canons, is called γάμος, marriage. And so the union between a free man and a female slave is called concubinage, not marriage;

monium: quod deinde imitatione quadam ad alias personas disparis qualitatis productum est: ut Athenis inter civem et peregrinam, unde Servius ad illud Virgilii (*Æn.* vii. 284):

Suppositos de matre nothos furata creavit:

v. 1640.

Var. Hist.
vi. 10.

Nothos interpretatur materno genere ignobiles et obscuros. Apud Aristophanem *Avidus* qui dixerat, νόθος γὰρ εἰ, κοῦ γνήσιος, dictum probat ὦν γε ξένης γυναικός: quippe cum ex peregrina natus sit. Et apud Ælium γνήσιος definitur ὃς ἐξ ἀμφοῖν γέγονεν ἀσποῖν, qui utroque parente cive natus sit.

2 Atqui sicut in statu naturæ inter tales, quales jam diximus, conjugium verum esse potuit, si femina esset sub custodia maritali, et fidem marito dedisset: sic etiam in statu legis Christianæ verum erit inter servum et ancillam, aut liberum et servam conjugium; multoque magis inter civem et peregrinam, senatorem et libertam, si quæ jura divino Christiano sunt necessaria accedant, scilicet indissolubilis unius cum una con-

* In statu legis Christianæ] Vide in Gratiani collectione c. 1, de conjugiliis servorum. (Decretal. iv. 9. 1.)

* Pro uxore concubinam habet] De tali concubina Augustinus de Fide et Operibus (cap. 19): de concubina quoque, si professa fuerit nullum se alium cognituram, etiamsi ab illo cui subdita est dimittatur, merito dubitatur, utrum ad percipiendum baptismum non debeat admitti. Idem de Bono Conjugii cap. 5. Solet etiam quæri, cum masculus et femina, nec ille maritus, nec illa uxor alterius, sibimet non filiorum procreando-

rum, sed propter incontinentiam solius concubitus causa copulantur, ea fide media, ut nec ille cum altera, nec illa cum altero id faciat, utrum nuptiæ sint vocandæ. Et potest quidem fortasse non absurde hoc appellari concubium, si usque ad mortem alicujus eorum id inter eos placuerit, et prolis generationem, quamvis non ea causa conjuncti sint, non tamen vitaverint, ut vel nolint sibi nasci filios, vel etiam opere aliquo malo agant, ne nascantur. Itaque in capitulari Francoeo vii. c. 255. dicitur: Qui uxorem habet, eodem tempore concubi-

and this name was afterwards extended to other persons of unequal quality; as at Athens, to a union between a citizen and a foreigner. So in Virgil, Aristophanes, Ælian, the child of a foreign mother by a citizen is called *nothus*, illegitimate. [See.]

2 But as in a state of nature, such unions as we have spoken of might be true marriage, if the woman was under marital custody, and had vowed fidelity to the husband; so also in the state of the Christian Law, a union between a slave and a male servant, or between a free man and a female slave, will be a true marriage; much more a union between a citizen and a foreigner, or a senator and a freed woman; if the conditions which are necessary by instituted Christian Law are present, namely, the indissoluble conjunction of one man and one woman; although some effects of the Civil Law may not follow this union, or some which would spontaneously follow may be impeded.

unctio, etiamsi effectus quidam legis civilis non sequantur, aut alioqui sponte secuturi lege impediuntur. Atque hunc in sensum capienda sunt verba concilii Toletani primi: *Cæterum is, qui non habet uxorem, et pro uxore concubinam habet, a communione non repellatur: tamen ut unius mulieris, aut uxoris, aut concubinæ, ut ei placuerit, sit conjunctione contentus.* Cui adde locum in Clementis *Constitutionibus* lib. viii. cap. xxxii. Pertinet huc quod Theodosius et Valentinianus concubinatum quendam vocant inæquale conjugium, et quod inde adulterii accusatio nasci dicitur.

Dist. xxxiv. 4

Lib. iii. C. de Nat. Lib.

Lib. xiii. D. ad l. Jul. de Adult.

XVI. 1 Imo etiam si lex humana conjugia inter certas personas contrahi prohibeat, non ideo sequetur irritum fore matrimonium, si reipsa contrahatur. Sunt enim diversa, prohibere, et irritum quid facere: nam prohibitio vim suam exserere potest per pœnam vel expressam, vel arbitrariam: et hoc genus leges imperfectas vocat Ulpianus, 'quæ fieri quid vetant,

Instit. Tit. i. § 1.

nam habere non potest, ne ab uxore eum dilectio separet concubine.

'Quæ fieri quid vetant, sed factum non rescindunt] Livius, libro x. (cap. 9.) Valeria lex, cum eum qui provocasset virginis cadi, securique necari vetuisset, si quis adversus ea fecisset, nihil ultra quam improbe factum adjecit: id (qui tum pudor hominum erat) vinum credo vinoulum satis validum legis: nunc vix servota minetur quisquam. Lex Furla testamentaria plusquam mille assium legatum mortisve causa prohibebat capere, præter exceptas personas, et adversus

eum qui plus ceperit, quadrupli pœnam constituebat, memorante Ulpiano. (Tit. i. § 2.) Macrobius circa finem eorum quæ scripsit ad somnium Scipionis (Lib. ii. c. 17): *Inter leges illa imperfecta dicitur, in qua nulla deviantibus pœna sancitur.* Vide supra hoc capite § 14. in fine. Sic divus Marcus rescripsit: *Eum heredem, qui prohibet funerari ab eo, quem testator elegit, non recte facere: pœnam tamen in eum statutam non esse.* (L. 14. § 14. D. De Religiosis et sumptibus funer.)

In this sense are to be understood the words of the first Council of Toledo: *He who, not having a wife, has a concubine, is not to be rejected from the Communion; so only that he be content with the society of one woman, whether wife or concubine.* Add to this, the passage in the Clementine Constitutions. So Theodosius and Valentinian call certain cases of concubinage unequal marriages, and say that a charge of adultery may arise out of them.

XVI. 1 And even if human Law forbid marriages between certain persons, it does not follow that the marriage is void, if it be really contracted. For these are two different operations, to prohibit, and to annul what is done. For prohibition may exert its force by a penalty either express or arbitrary. Ulpian calls this kind of Laws imperfect, which forbid a thing to be done, but do not rescind it if done. Such was the Cincian Law.

sed factum non rescindunt: qualis erat lex Cincia, quæ supra certum modum donare vetabat, donatum non rescindebat.

*L. non Dub.
5. C. de Leg.*

2 Scimus apud Romanos postea Theodosii lege inductum: ut si quid lex prohibuerit tantum, non etiam specialiter dixerit inutile esse debere quod contra factum est, id ipsum tamen cassum, inutile, ac pro infecto sit, nimirum si in iudicium res deveniat: sed hæc extensio non fit ex vi solius prohibitionis, sed ex vi novæ legis, quam alii populi sequi necesse non habent. Sæpe enim indecentia est major in actu quam in effectibus: ¹sæpe etiam incommoda, quæ rescissionem sequuntur, maiora quam ipsa indecentia, aut incommodum actus ipsius.

*Viot. de Pol.
Civ. n. 14.*

XVII. Consociationes præter hanc maxime naturalem sunt et aliæ, tum privatæ, tum publicæ: et hæc quidem aut in populum, aut ex populis. Habent autem omnes hoc commune, quod in iis rebus ob quas consociatio quæque instituta est, universitas, et ejus pars major nomine universitatis obligant singulos qui sunt in societate. Omnino enim ea credenda est fuisse voluntas in societatem coeuntium, ut ratio aliqua esset expediendi negotia: est autem manifeste iniquum, ut pars major sequatur minorem: quare naturaliter, ²seclusis pactis ac legibus, quæ formam tractandis negotiis imponunt, pars

¹ *Sæpe etiam incommoda, quæ rescissionem sequuntur, maiora quam ipsa indecentia*] Ideo rex Alcinoüs Medeam reddi volebat patri, si deflorata nondum esset. Meminit Apollonius Argonautis, (vers. 1316, et seqq.) et ejus Scholiastes:

et in bibliotheca Apollodoræ. (Lib. I. c. 9. § 25.)

² *Seclusis pactis ac legibus*] Ut quæ volunt duas partes concordare, ut c. 6, de Electione.

³ *Quod pluribus visum id valere*]

2 Afterwards there was a law of Theodosius made, that if the law had only prohibited a thing, and had not specially said that what was done in contradiction of it was void, yet that the thing so done was null, void, and of no effect; that is, if the matter came into a court of justice. But this was not in virtue of the prohibition alone, but of the new Law; and such a rule other nations are not bound to follow. For often the indecency in the act is greater than in the subsequent effect; and often the inconveniences which follow the rescinding of the act are greater than the indecency or inconvenience of the act itself.

XVII. Besides marriage, the most natural of partnerships, there are others, both private and public; and these latter, either partnerships in *populum* or *ex populis*. All partnerships have this in common, that in

major jus habet integri. Thucydides: κύριον εἶναι ὃ, τι ἂν Lib. v. 30.
 τὸ πλῆθος ψηφίσῃται. Appianus: ἔστι δ' ἓν τε χειροτο- De Bell. Civ.
 νίαις καὶ δίκαις αἰεὶ τὸ πλεόν δικαίωτερον: tam in comitiis lib. p. 500.
 quam in judiciis vincit pars major. Dionysius Halicarnas-
 sensis similiter: ὃ, τι ἂν δόξῃ τοῖς πλείοσι, τοῦτο νικᾷν, Ant. Rom. II.
 2 quod pluribus visum, id valere. Et alibi: ὃ, τι δ' ἂν οἱ lib. vii. 36.
 πλείους ψήφοι καθαιρῶσι, τοῦτο ποιεῖν. Item: ὃ, τι ἂν αἱ Ibid. c. 30.
 πλείους γνῶμαι καθαιρῶσι, τοῦτο εἶναι κύριον. Aristoteles:
 κύριον τὸ τοῖς πλείοσι δόξαν. Curtius, Lib. x. Eo quod Polit. iv. 8;
 major pars decreverit, stetur. Prudentius [in Symmach. Cap. 6. n. 15.
 I. 599]:

In paucis jam deficiente caterva
 Nec persona sita est patriæ, nec curia constat.

Deinde (vers. 607, 608):

Infirma minoris

Vox cedat numeri parvaque in parte quiescat.

Apud Xenophontem hoc dicitur: ἐκ τῆς νικώσης πράττειν De Cyr. Exp.
 πάντα, omnia agere secundum eam sententiam, quæ vincit. vi. l. § 11.

XVIII. Quod si pares sint sententiæ, nihil agetur: quia
 ad mutationem non satis momenti est: qua de causa ubi pares
 sunt sententiæ, reus absolutus intelligitur: quod jus Minervæ
 calculum Græci vocant ex fabula de Oreste: quæ res apud

Hunc sensum dant Chaldeus Paraphras-
 tes et Rabbinus ad illud in Exodo xxiii. 3.
 Adjungo l. duo 39. et l. Pomponius 38.
 D. de re judicata; et quæ infra Lib. III.
 cap. xx. § 4. et quæ paria cum Pruden-
 tio habet Ambrosius contra Symma-

chum.

* Reus absolutus intelligitur] L. inter
 pares: 38. D. de re judicata. Vide Juli-
 anum de Eusebia. (Orat. III. pag. 116
 A. Edit. Spanhem.)

those matters for which the partnership was instituted, the whole
 body, and the majority as representing the whole, bind the special
 members of the partnership. For it must be supposed to have been
 the intention of those who united to make the society, that there
 should be some way of promoting business; and it is manifestly unjust
 that the greater part should follow the less; wherefore by Natural
 Law, not taking into account pacts and laws which prescribe a form
 for conducting business, the majority has a right to act for the whole.
 So Thucydides, Appian, Dionysius Halicarnassensis, Aristotle, Curtius,
 Prudentius, Xenophon. [See.]

XVIII. If the opinions are equally divided, nothing must be
 done; for then there is not so much power of movement as is requisite
 for a change. And for this reason, if the opinions of the judges are

Æschylum Furiis, et apud Euripidem ⁴ *Oreste* et *Electra* tragœdiis tractatur. Sic et possessor rem tenet: quæ ratio non male observata est a scriptore problematum, quæ Aristoteli Lib. I. contr. 2. adscribuntur, sectione XXIX. In Senecæ controversia quædam est: *Alter judex damnat, alter absolvit: inter dispares sententias* ^a *mitior vincat*. Nam sic et in dialecticis collectionibus illatio eam partem sequitur, quæ minus onerat.

XIX. Sed hic quæstio oriri solet de conjungendis aut dividendis sententiis: qua de re ex mero jure naturali, id est, si pactio aut lex aliud non præcipiat, distinguendum videtur inter sententias, quæ totis rebus differunt, et inter eas, quarum altera partem alterius continet, ut hæc ^b *conjungendæ* sint in eo, quo conveniunt, illæ non item. Sic qui in viginti damnant, et qui in decem, conjunguntur in illo decem adversus sententiam absolventem. At qui morte reum puniunt, et qui relegant, non conjunguntur, quia diversa hæc sunt, et in morte non est relegatio. Sed nec absolventes cum relegantibus conjunguntur, quia etsi non interficiendum reum consentiunt,

⁴ *Oreste et Electra*] Etiam *Iphigenia in Tauris* (vers. 1470); in *Electra* sic ait:

Καὶ τοῖσι Λοκῶσι ὁδε νόμος τεθόσται,
Ναὶν ἱεροῖς ψάλλουσι τὸν φεύγοντα del.

Idemque cunctis juris esto in posterum.
Certante numero judicium ut vincat reus.
(vers. 1268.)

^a *Mitior vincat*] Seneca in controversia (1, 5): *Non est invidiosa po-*

testas quæ misericordia vincit. Imo apud Hebræos una sententia damnantium vincens pro nulla habebatur: ita Chaldæus ad dictum locum Exodi xxiii. et Moses de Kotzi præceptorum jubenantium xcviii. et vetantium cxov.

^b *Conjungendæ sint in eo, in quo conveniunt*] Ideo senatores dividere sententiam plura simul complectentem jubebantur, teste Asconio in Miloniamam.

equally divided, the accused is acquitted; by what the Greeks call Minerva's vote. [See *Æschylus* and *Euripides*.] So too the person in possession keeps the property. [See *Aristotle* and *Seneca*.]

XIX. Here a question often arises how the votes are to be taken, together or separate. And here, so far as Natural Law goes, that is, if there be no pact nor precept of Law, there is to be a difference made between the opinions which are altogether different, and those of which one contains a part of another; and these latter are to be conjoined in the point in which they agree. Thus if one party of the judges would fine a man in 20 pounds, and one in 10, they are to be joined, as to the 10, against the party which would acquit. But those who vote for the death of the accused, and those who vote for his exile, are not to be conjoined; for death does not include exile. But also those that acquit must not be joined with those who vote for exile; because although they agree not to put the accused to death, that is

id tamen non est illud ipsum quod dicit sententia, sed per consequentiam inde elicitur: at qui relegat, non absolvit. Quare recte Plinius, cum tale quid in senatu evenisset, tantam dixit sententiarum esse diversitatem, ut non possent esse nisi singulæ; et parvulum referre, an idem displiceret, quibus non idem placuisset. Et ^cPolybius notat a Postumio prætore fraudem factam in rogandis sententiis, cum eos, qui captivos Græcos damnandos, et qui ad tempus retinendos censebant, contra absolventes conjungeret. Exstat hujus generis quæstio apud Gellium libro ix. et apud Curium Fortunatianum in loco de quantitatum comparatione: et apud Quintilianum patrem controversia cccxlxv. ubi hæc verba sunt: *Jam aperte ex una plures facis: jam turbam istam, quæ universa noceret, dividendo extinguis. Duo earlium, duo ignominiam pronuntiant. Vis ego illos jungam, qui seipso dividunt?*

Lib. viii.
Epist. 14.Excerpt.
Leg. 152.Noct. Att. ix.
15.

XX. Addendum et hoc: si qui absentia, aut aliter impediti jure suo uti non possunt, eorum jus interim accrescere

(Cap. 6). Cicero *Epistolarum ad Familiares* 1, 2. *Itaque cum sententia prima Bibuli pronunciata esset, ut tres legati regem reducerent; secunda Hortensii, ut tu sine exercitu reduceres; tertia Volcatii, ut Pompeius reduceret; postulatum est, ut Bibuli sententia divideretur: quatenus de religione dicebat, cuique rei jam obristi non poterat; Bibulo assensum est: de tribus legatis frequentes ierunt in alia omnia. Seneca*

epistola xxi. Quod fieri in senatu solet, faciendum ego in philosophia quoque existimo: cum censuit aliquis, quod ex parte mihi placeat, jubeo illum dividere sententiam, et sequor. Idem de Vita Beata c. 3. Est et mihi censendi jus: itaque aliquem sequar, aliquem jubebo sententiam dividere: meminit ejus moris et Plinius Lib. viii. epist. 14.

^c Polybius] Vide ad eum locum Fulvii notas.

not precisely what the vote expresses, but is deduced from it by a consequence, for he who exiles does not acquit. Whereupon Pliny, when something of this kind had happened in the senate, said that the diversity of opinions was so great that they must be taken singly; and that it made little difference that several rejected the same thing, if they could not all accept the same thing. So Polybius notes that Postumius the Prætor took an unfair course with regard to the Greeks, when he took the votes, and put together those who condemned them to slavery, and those who thought they should be kept for a limited time, against those who absolved them. So other cases in Gellius and in Quintilian.

XX. This also is to be added, that if any members are absent, or otherwise prevented from using their vote, their right devolves on those who are present. [See Seneca.]

Lib. III. contr.
19.

D. de Albo
Scribendo.

Ethic. Nic.
viii. 12.

Lib. I. C. De
Consul. xii.

præsentibus: quod ^dSeneca in controversia quadam exsequitur: *Putat te servum esse communem: huic domino servies, ^equi præsens est.*

XXI. ^fNaturalis autem ordo inter socios hic est, prout quisque in societatem venit. Sic inter fratres is servatur ordo, ut qui primus natus est reliquos præcedat, atque ita deinceps, rejectis aliis omnibus qualitatibus: *ἴσοι γὰρ*, inquit Aristoteles, *πλὴν ἐφ' ὅσον ταῖς ἡλικίαις διαλλάττονται*, *pares enim sunt fratres, nisi quatenus ætas eos distinguit.* Theodosius et Valens in constitutione de ordine inter consules servando: *Quis enim in uno eodemque genere dignitatis prior esse debuerat, ^gnisi qui prior meruit dignitatem?* Atque hic mos antiquitus in Christianorum quoque regum ac populorum societate obtinuit, ut qui primi Christianismum professi sunt, ^hin conciliis ad rem Christianam pertinentibus præcedant ceteros.

XXII. Illud tamen addendum est: quoties societas fundamentum habet in re, quam non æqualiter omnes participant,

^d Seneca in controversia quadam Libro III. contr. xix. [Sed casus est paullo diversus, ut patet. J. B.]

^e Qui præsens est? Ita ut et ad unum recidere possit nomen universitatis l. sicut. 7. § 2. D. quod cuiusque universitatis nomine, ubi Wesembecium vide. Adde l. rescriptum, 10. D. de Pactis. Zas. in paratit. D. de Pactis. Bart. in Lib. I. num. 3. de albo scribendo. Bær, decia. I. num. 4. Antonium Fabrum codice Sabaudico, Lib. I. tit. III. definit. 40. Reinking. Lib. I. classe v. c. 8.

Sæpe tamen et hic, ut in illa regula de majore parte, leges exceptionem dant, puta ut duas partes adesse debeant L. Nulli, 3. D. dicto titulo, quod cuiusque univ. nomine L. nominationum, 46. C. de decurionibus: ut absentes præsentibus vices suas mandare aut suffragium per procuratorem dare possint c. si quis justo, 46. de Electione in vi.

^f Naturalis ordo] De præcedentiis vide, si lubet, M. Antonium Nattam cons. loc. n. 22. et cons. loc. LXXVIII. num. 31. Mart. Wachter consiliis Cæ-

XXI. The natural order of precedence in a partnership is the order in which the members have come into it. So the eldest brother always retains his superior privileges. See Aristotle. So Theodosius and Valens, of precedence between the Consuls. So in the general association of Christian kings and nations, formerly those had precedence in the councils who had first professed Christianity.

XXII. It is to be added however, that when a partnership has its foundation in property which all do not equally share in; as if, in an inheritance or other estate, one person has a half, one a third, one a fourth; then, not only is the order of precedence to follow the order of shares, but also the weight of the votes must be proportional to the shares. And as this is the rule of natural equity, so is it also

ut si in hereditate aut fundo alius dimidiam partem habeat, alius tertiam, alius quartam, tunc non tantum ordinem sumendum ex modo participationis, sed et sententias ad eum modum, id est, mensoria, ut loquuntur, proportionē aestimandas. Quod sicut naturali sequitati convenit, ita Romanis quoque legibus probatum est. Ita narrat Strabo cum Cibra et tres vicinæ urbes in unum quasi corpus coissent, convenisse, ut aliarum singula essent suffragia, Cibræ bina, eo quod in commune hæc multo plus ceteris conferret. Idem in Lycia viginti et tres ait fuisse urbes, quarum ¹aliæ terna, aliæ bina, aliæ singula ferrent suffragia, et ad eundem modum onera tolerarent. Sed recte notat Aristoteles id ita demum æquum fore, *εἰ κτημάτων χάριν ἐκοινωνήσαν, εἰ possessionum causa inita est societas.*

L. 8. D. de
Pact. L. 14.
D. Deposit. L. 16. D. de
Reb. Auct.
Jud. Possid.
Lib. xiii. p.
631.

Lib. xiv. p.
665.

Politie. iii. 9.

XXIII. Consociatio, qua multi patres familiarum in unum populum ac civitatem coeunt, maximum dat jus corpori in partes: quia hæc perfectissima est societas: neque ulla est actio hominis externa, quæ non ad hanc societatem aut per

saris in controversia Saxonica. [Addi potest Distriba singularis *De Jure Precedentie*, a JACOBO GOTHOFREDO, summo Ioto, conscripta, et ex ejus secundis curis longe auctor edita *Genevæ*, 1664. J. B.]

⁵ *Nisi qui prior meruit dignitatem*] Adde L. omnes, 2. C. ut dignitatum ordo servetur. L. semper, 5. D. de jure immunitatis. L. ult. C. de tironibus.

⁶ *In conciliis*] Joh. Fico, cons. latino LXXVII. n. 16. Afflictus decia. Neap. i. n. 8. Bart. in l. 1. D. de albo scri-

bendo. Innoc. in c. Tua. de Majoritate et obedientia. Ant. Tassaurus i. quest. for. XLVIII. n. 5. Tiberius Decianus responso XIX. n. 183. et seqq. Innocentius Butr. Felin. in c. statulumus D. tit. de Majoritate. Bal. in Decernimus, in 2. notabili, c. de Sacrosanctis ecclesiis. Sed præcipue vide *Æneam Silvium* in concilii Basileensis historia. [Confer Auctoris *Epistolas* 722, 797.]

¹ *Alia terna, alia bina*] Sic in Smalcaldico fœdere Saxo duo habebat suffragia.

the rule of the Roman Law. So Strabo mentions a league between Cibra and those neighbouring cities in which Cibra had two votes, (as contributing more;) the others, one each. And again, in Lycia, he says there were 23 cities of which some had 3 votes, some, 2, some, one only, and bore the burthens in the same proportion. But, as Aristotle says, this is right, if the partnership be formed for the sake of possession.

XXIII. An association in which many fathers of families coalesce into one people and state, gives the greatest right to the body over its parts; for this is the most perfect society; nor is there any external act of man which either does not regard this society of itself, or may not regard it from circumstances. It may, as Aristotle says, make laws on all subjects.

se spectet, aut ex circumstantiis spectare possit. Et hoc est quod ab Aristotele est proditum: τοὺς νόμους ἀγορεύειν περὶ πάντων, *leges de omnis generis rebus præcipere.*

[olim et
apud Argi-
vos: Ovid. II.
Metam. 28.
G.]

L. 22. D. ad
Municip. § 2.

XXIV. 1 Solet hic illud quæri, ^kan civibus de civitate abscedere liceat, venia non impetrata. Scimus populos esse, ubi id non liceat, ut apud Moschos: nec negamus talibus pactis iniri posse societatem civilem, et mores vim pacti accipere. Romanis legibus, saltem posterioribus, domicilium quidem transferre licebat: sed non eo minus qui transtulerat municipii sui muneribus obligabatur. Verum in quos id constitutum erat, ii manebant intra fines imperii Romani: atque ea ipsa constitutio specialem spectabat utilitatem tributariæ præstationis.

2 At nos quid naturaliter, si nihil aliud convenerit, obtinere debeat quærimus: nec de parte aliqua, sed de tota civitate, sive unius summi imperii complexu. Et sane ^lgregatim discedi non posse, satis expeditum est ex necessitate finis, quæ jus facit in moralibus: ^mnam id si liceat, jam civilis societas

^k An civibus de civitate abscedere liceat] Vide hac de re fœdera Helvetica apud Simlerum (pag. 203. Ed. Elsevir. 1827) et alios. Servius in excerptis Fuldensibus II. *Æneidos* (vers. 166): *Consuetudo antiqua fuerat, ut qui in familiam vel gentem transiret, prius se abdicaret ab ea, in qua fuerat, et sic ab alia reciperetur.* Exempla fidei regibus

renuntiatis vide aliqua apud Marianam, ac postremum illustre libro XXVIII. c. 13.

^l Gregatim discedi non posse] Zonaras de Lazo rege agens, qui a Persis ad Romanos defeceat: τοῦτο αἰτίον μάχης Ῥωμαίοις καὶ Πέρσαις ἐγένετο, ὡς τοῦ βασιλέως Ῥωμαίων τοὺς αὐτοὺς ὑπέκριντας σφετεριζομένων. Id belli initium Romanis ac Persis fuit, quod

XXIV. 1 It is often asked, whether citizens may quit the State without leave obtained. We know that there are peoples where this is not permitted, as the Muscovites; nor do we deny that civil society may be formed on such a pact, and that usage may take the force of a pact. By the Roman Laws, at least in their later forms, a person was allowed to remove his domicile; but he who had done so, was still bound by the obligations of the town to which he belonged. Those who were under such rule remained within the limits of the Roman empire, and the rule referred specially to the interests of the tributary collection.

2 But the question for us is, What ought to be the rule by Natural Law, if no agreement has been made; and this, as relates, not to any part only, but the whole of the state or the whole body of a sovereign empire. And that the subjects may not depart in large bodies, is evident enough from the necessity of the end, which gives a right in moral matters; for if that were permitted, Civil Society could no longer subsist. With regard to the emigration of individuals, the case

subsistere non possit. De singulorum discessione alia res videtur, sicut aliud est ex flumine aquam haurire, aliud rivum diducere. *De sua cuique civitate statuendi facultas libera est*, ait Tryphoninus. Cicero pro Balbo laudat jus illud, *ne quis in civitate maneat invitus, et fundamentum vocat libertatis, sui quemque juris et retinendi, et dimittendi esse dominum*. Tamen hic quoque servanda est regula naturalis æquitatis, quam Romani in privatis societatibus dirimendis secuti sunt, ut id non liceat si societatis intersit. Semper enim, ut recte inquit Proculus, non id quod privatim interest unius ex sociis servari solet, sed quod societati expedit. ^mIntererit autem societatis civilis non abire civem, si magnum contractum sit æs alienum, nisi paratus sit civis in præsens partem suam exsolvere: item si fiducia multitudinis bellum sit susceptum, præsertim si obsidio immineat, nisi paratus sit civis ille alium æque idoneum substituere, qui rempublicam defendat.

L. in Bell. 12.
§ 9. D. de
Capt. et Post.
Cap. 13.

L. Actions, 68.
§ Labco. 5.
D. Pro Socio.

3 Extra hos casus credibile est ad liberam civium discessionem consentire populos, quia non minus ex ea libertate commodi sentire aliunde possunt.

Romanus princeps ad se advocaret Persie subditos. [Dicendum erat, *de Lazorum Rege*, non *de Lazo rege*. Et nomen erat Txathus. Locus est in Justinii Thracis vita. Lib. xiv. cap. v. J. B.]

^a Vix accidere potest, ut gregatim Cives discedant, nisi quando aut imperium tyrannicum factum fuit, aut

calamitate quadam vel quocumque alio casu multi homines in civitate non amplius reperiunt unde victum quassant. Uterque autem casus tacite exceptus intelligitur in pacto, quo aliquis Civitatis se obstrinxit. J. B.

^m *Intererit autem societatis*] Bembus libro vii.

is different; as it is one thing to take water out of a river in a vessel, another thing to turn off a part of the river by a side cut. Some hold that each ought to be at liberty to choose his own city: so Tryphoninus; Cicero. But here the rule of natural equity is to be observed, which the Romans followed in winding up the affairs of private societies; that it should not be done, if the interests of the society forbade: That is to be done, said Proculus, not which is the interest of one member, but of the whole society. And it is for the interest of the society that a citizen should not leave the country, if the country be greatly in debt, except the citizen is prepared to pay his part; and again, if the country have undertaken war, relying upon its population, especially if a siege be likely; except that citizen be willing to find a substitute to take his place in defending the country.

3 Except in these cases, it is to be supposed that a people agree to the free departure of citizens; for they derive advantages from it in other ways.

XXV. Sic "in exules nullum jus civitati. Heraclidæ Argis ejecti ab Eurystheo, per tutorem suum Iolaum, sic loquuntur apud Euripidem (*Heraclid.* vers. 186):

Quo jure jam nos ad Mycenæos trahat,
Eadem agentes urbe quos urbe expulit?
Nunc ergo cives non sumus.

*Orat. de
Bigis, p.
340 D.*

Alcibiadis filius in Isocratea oratione agens de temporibus ejecti patris: ὅτ' οὐδὲν αὐτῷ τῆς πόλεως προσήκεν ° *cum nihil ad illum civitas nostra pertineret.* Jam vero plurium populorum, sive per se, sive per capita sua consociatio fœdus est, de cujus natura et effectu locus agendi erit, ubi ad obligationem ex pacto erit deventum.

XXVI. Subjectio ex consensu, aut privata est, aut publica. Subjectio privata ex consensu esse potest multiplex, sicut multiplicia sunt regiminum genera. Nobilissima species est arrogatio, qua quis sui juris se ita dat in familiam alterius, ut ei subsit ad eum modum, quo filius qui maturæ est ætatis, subest patri. Pater autem filium suum eo modo dare alteri non potest, ut jus paternum plene in eum transeat, et ipse paterno officio exsolvatur: id enim natura non sinit: sed potest filium alteri commendare, et alendum dare quasi substituendo.

XXVII. 1 Subjectionis species ignobilissima est, qua

° *In exules nullum jus civitati]* Vide infra libro III. tit. xx. § 41.

° *Cum nihil ad illum civitas nostra pertineret]* Nicetas Isaaci Angeli rebus libro 1. μὴ καινὸν εἰ διφύη τις τὸν ἀντίπαλον καὶ κολακεύσει ὡς φίλον, τὸν οἰκεῖον εὐρίσκων πολέμιον. *Non mirum si quis hostem amicitie blan-*

diatur, qui suos sibi hostes senserit. (Cap. 10).

° *Ex contractus formula serviant]* Ægyptiis id olim vetitum. Athenis permissum ad Solonis tempora: is constituit ἐπὶ σώμασι μὴ δανείζεσθαι, *corpus pro credito ne obligaretur.* Plutarchus Solone. (pag. 86 D.) Idem lex Pe-

XXV. The State has no authority over exiles. So say the Heraclidæ in Euripides; so the son of Alcibiades in Isocrates.

The association of several peoples, either by themselves or by their heads, is a League: and we shall hereafter treat of such, when we come to obligations by compact.

XXVI. [Next of Subjection by Consent, as a kind of Association.]

Subjection by consent is either private or public. Private subjectio by consent may be manifold, as there are many kinds of [private] government. The noblest species of this is *Arrogatio*, by which a person who is his own master, gives himself into the family of another, to be subject to him, in the same manner that a son of mature age is sub-

quis se dat in servitutem perfectam, ut illi apud Germanos qui novissimo alæ jactu de libertate contendebant: *Victus voluntariam servitutem adit*, ait Tacitus. Etiam apud Græcos, ut ^{De Morib. Germ. c. 24. p. 241 n.} narrat Dion Prusæensis oratione xv. *μύριοι δὴπον ἀποδίδονται ἑαυτοὺς ἐλεύθεροι ὄντες, ὥστε δουλεύειν κατὰ συγγραφὴν innumeri cum liberi sint, se in servitutem dant, ut pex contractus formula serviant.*

2 Est autem servitus perfecta, quæ perpetuas operas debet pro alimentis et aliis, quæ vitæ necessitas exigit: quæ res si ita accipiat in terminis naturalibus, nihil habet in se nimis acerbitalis: nam perpetua ista obligatio compensatur perpetua illa alimentorum certitudine, quam sæpe non habent, qui diurnas operas locant, unde accidit sæpe, quod dixit Eubulus:

Ἐθέλει δ' ἄνεν μισθοῦ παρ' αὐτοῖς καταμένειν
Ἐπὶ στείροις⁶.

Manere apud illos voluit, mercedis carens,
Victu contentus.

Idem Comicus alibi:

Πολλοὶ φυγόντες δεσπότας, ἐλεύθεροι
Ὅντες, πάλιν ζητοῦσι τὴν αὐτὴν φάτνην.
Qui se fugitivi gesserunt pro liberis:
Multi recurrunt pristina ad præsepia.

tilla Romæ constituit. [Lex Ægyptia, qua id vetabatur, a Bocchori sancita fuerat, et refertur a DIODORO SICULO, Lib. i. cap. 79. p. 50. Ed. H. Steph. De *Lege Patilia*, vide VARRON. *De L. Lat.* Lib. vi. pag. 82. et LIVIUM, Lib. viii. cap. 28. J. B.]

⁴ Nihil habet in se nimis acerbitalis]

Vide ea de re egregiam Busbequii dissertationem epist. exoticarum tertia.

⁶ Apud ATHENÆUM, unde hæc desumpta sunt, est, Ἐπιστείριος. Lib. vi. cap. 12. Duo autem versus sequentes habentur apud STOBÆUM, Serm. 62. J. B.

⁷ Pristina ad præsepia] Apud Plau-

ject to a father. But a father cannot give his son to another, in such a manner that the paternal power passes fully to him, and that he should discharge the office of father; for this, nature does not suffer. But he may commend his son to another, and give him to the other to be brought up as an adopted son.

XXVII. 1 The most ignoble species of subjection is that in which a person gives himself into perfect slavery; as those among the Germans who played the last throw of the dice for their own liberty, as Tacitus says. So Dio Prusæensis.

2 That is perfect slavery, when a man gives his whole labour for ever for the sustenance and other necessities of life. If the matter is

Sic in historiis notabat Posidonius Stoicus, ⁷multos olim fuisse, qui suæ imbecillitatis conscii, sponte se aliis in servitutem darent: ὅπως παρ' ἐκείνων τυγχάνοντες τῆς εἰς ἀνάγκαια ἐπιμελείας, αὐτοὶ πάλιν ἀποδιδῶσιν ἐκείνοις δι' αὐτῶν ἅπερ ἂν ὦσιν ὑπερετεῖν δυνατόι. *Ut domini quidem ipsis providerent de necessariis, ipsi vero operam vicissim quam possent præstarent.* Exemplum addunt ⁸alii in Mariandynia, qui eandem ob causam servos se fecerint Heracleotarum.

XXVIII. Jus autem vitæ ac necis ⁹(de plena et interna justitia loquor) domini in servos non habent: nec quisquam homo hominem jure potest interficere, nisi is capital commiserit. Sed quorundam populorum legibus dominus, quacunque de causa servum interfecerit, impune fert, ut ubique reges, qui liberrimam habent potestatem. Hac comparatione ante nos usus est Seneca: *Si servo quominus in nomen meriti perveniat, necessitas obest, et patiendi ultima timor, idem istud obstat et ei, qui regem habet, et ei qui ducem, quoniam quanquam sub dispari titulo paria in illos licent.* Cum tamen haud dubie servus a domino injuriam possit accipere, ut recte affirmat idem Seneca: sed agendi impunitas improprie

Lib. III. de
Benef. 18.

Lib. III. de
Benef. 22.

tum quidam (*Casim. II. 4. 14*):

Liber si sim, meo periculo vivam, nunc vivo tuo. Melissus Spoletinus Grammaticus manumitti noluit. [*Suet. Gramm. c. 21*].

⁷ Habet hoc ex *ATHENÆO*, Lib. vi. cap. 18, pag. 263 c. *Edit. Casaub. 1657. J. B.*

⁸ Hoc sequitur statim post verba Posidonii apud *ATHENÆUM*, loco indicato. Sed Maryandinos vi servire coactos Heracleotis, ait *STRABO*, *Geogr. Lib. xii. pag. 817 A. J. B.*

⁹ De tota ista materia confer *PUFENDORFIUM* nostrum, *De Jure Nat. et Gent. Lib. vi. cap. 3. et de Offic. Hom. et Civ. Lib. ii. cap. 4. J. B.*

¹⁰ *Patres non minus quam matres fatuum curam gerant*] Vide infra cap. viii. § 18. *Plinius x. 34. de Columbis: Amor utrique sobolis æqualis.*

¹¹ *Partus non minus patrem sequetur quam matrem*] Seneca de *Beneficiis* VII. 12. *quomodo patri matrique communes liberi sunt? Lex Visigothica*

thus taken in natural terms, there is nothing shocking in this; for the perpetual obligation to labour is compensated by the perpetual certainty of food; which often those have not who work for daily wages. See Eubulus; Posidonius.

XXVIII. Masters have not over slaves the power of life and death, (I speak of plenary and internal jurisdiction,) nor can any one lawfully put a man to death, except he have committed a capital offense. But by the laws of some peoples, the master, if for any cause he has killed his slave, meets with impunity, as absolute kings do. Seneca before us had used this comparison. And yet undoubtedly a slave may receive a Wrong from his master, as Seneca also affirms; but impunity is not properly called a Right. The like right Solon gave

jus dicitur. Quale jus et Solon parentibus in liberos concesserat, et veteres Romanorum leges. Sopater: ἔξῃν πατρὶ Sext. Empir. Pyrr. 211. c. 24 § 211.
 ὄντι τοὺς παῖδας ἀνελεῖν. ἔξεστιν εἰάν ἀμάρτη τι. καὶ ὅτι ὁ νόμος τοῦτο εἰδὼς ὡς εἰλικρινὴς γένοιτ' ἂν δικαστὴς ὁ πατήρ, τοῦτο προσέταξεν. *Licuit ipsi cum pater esset filios interficere: nempe si quid peccatum esset: nam lex id ipsi permisit, ideo quia credidit integrum judicem fore.* Idem jus obtinere παρὰ πολλοῖς καὶ σφόδρα εὐνομουμένοις, *apud multos populos legum gloria florentes*, ait Dion oratione xv. p. 240 c.

XXIX. 1 De his qui ex servis nascuntur difficilior inspectio est. Romano jure et jure gentium circa captivos, ut dicemus alibi, ut in bestiis, ita in servilis conditionis hominibus partus matrem sequitur: quod tamen juri naturali non satis congruit, ubi pater aliqua ratione sufficiens cognosci potest: nam cum in mutis animantibus patres non minus quam matres foetuum curam gerant, hoc ipso ostenditur foetum utriusque esse communem. Sic ergo, si lex civilis hac de re tacuisset, partus non minus patrem sequeretur quam matrem. Ponamus ergo, quo minor sit difficultas, utrumque parentem ser-

Lib. x. tit. i. 17. *Si enim filius ab utroque parente gignitur et creatur, cur idem ad conditionem tantum pertineat genitricis, qui sine patre nullatenus potuit procreari?* Deinde: *Hac rationaliter natura lege compellimur, agnitionem ancille, quæ servo alieno juncta pepererit, inter utrosque dominos equaliter dividendam.* Slavi et Slavæ proles patrem sequebatur; *Speculum Saxonicum* iii. 37. Idem moris in nonnullis Italiae locis c. lleet 3. de conjugio servo-

rum. Apud Langobardos et Saxones sequitur partus partem deteriorem. *Spec. Sax.* i. 16. Idem apud Wisigothos in Hispania Isidori tempore obtulisse discas ex c. ult. causa xxxii. quæst. iv. Natus ex servo et ingenua eadem Wisigothorum lege fit servus. iii. tit. ii. 3. iv. tit. v. 7. ix. tit. 1. 16. Ex servo et ancilla nati inter dominos dividuntur. Si unus sit filius, habet eum servi dominus, ancillæ domino pretii dimidium persolvens. In origi-

parents over children, as did the old Law of Rome. See Sextus Empiricus and Dio.

XXIX. 1 The question concerning those who are born slaves, is more difficult. By the Roman Law, and by the Law of Nations respecting captives, as we shall explain elsewhere, as in beasts, so in men of servile condition, the offspring follows the mother; which however is not sufficiently congruous to Natural Law, when the father may be known by sufficient evidence. For since in dumb animals the father, no less than the mother, shares the care of the offspring, we have, in this, an evidence that the progeny belongs to both. And thus, if the Civil Law had been silent on this point, the progeny would follow the father no less than the mother. Let us suppose then, to

vitutem servire; et videamus, an naturaliter partus servilis futurus sit conditionis. Certe si alia nulla fuerit ratio educandi partum, potuerunt parentes prolem sibi nascituram in servitutem secum addicere: quippe cum tali ex causa etiam in libertate natos vendere parentibus liceat.

2 Sed cum hoc jus naturaliter ortum ducat ex ipsa necessitate, "extra eam non est jus parentibus prolem suam cuiquam addicere: quare jus dominorum in prolem servilem hoc casu nascetur, "ex ipsa alimentorum et eorum quæ vitæ necessaria sunt præbitione: ac proinde cum diu alendi fuerint e servis nati, antequam opera eorum domino utilis esse possit, et sequentes operæ sui temporis alimentis respondeant: effugere ita natis servitutem non licebit, nisi pro alimentis quantum satis est reddant. Certe si immanis sit domini sævitia, servos illos etiam qui ipsi se in servitutem dederunt, fuga consulere sibi posse probabilis sententia est. Nam quod Apostoli et an-

Less. v. 5.
dub. 5.

1 Cor. vii. 21.
Eph. vi. 5.
Col. iii. 22.
Tit. ii. 9.
1 Pet. ii. 16.

narilis patris originarii dominus duas fert partes, feminae originariae dominus unam, ex edicto Theodorici apud Casiodorum c. 67. in Anglia Francus quis et aut villanus ex patre: idemque in aliis conditionum discriminibus observatur. Littleton *de Villanagio*, et liber *de laudibus legum Angliæ*. Has leges a civili Romana discrepantes juri naturæ non repugnare agnoscit Thomas Aquinas.

(Suppl. Quæst. 52. Artic. 4. in Conclus.) quid ni, cum et Mensia lege apud Romanos alterutro parente peregrino natus peregrinus censeretur? ut nos docet Ulpianus in Institutionibus, titulo *de his qui in potestate*, v. § 8. [Vide ibi Notas Eruditissimi SCHULTINGII. De Originariis autem, qui lidem sunt ac *Adscriptitii*, consule JAC. GOTHOFRED. ad Lib. v. Tit. ix. *Cod.*

make the difficulty less, that both the parents are in slavery; and let us see whether the offspring would be of servile condition by Natural Law. Certainly if there were no other means of bringing up the offspring, the parents might give their future progeny along with themselves into slavery: since on such grounds, parents may even sell their children.

2 But since this Right by Natural Law flows from necessity only, it is not the right of the parents, in any other case, to give their children into slavery. And therefore the right of the owners over the progeny of slaves arises, in this case, from their supplying sustenance and the other necessities of life. And thus, when the children born of slaves are to be supported for a long time, and the subsequent labour corresponds to the aliment afterwards supplied, it is not lawful for those thus born to escape slavery.

But if the cruelty of the owner be extreme, it is a probable opinion that even those who have given themselves into slavery may seek refuge in flight. For what the Apostles and the ancient Canons prescribe to slaves, that they are not to withdraw themselves from their masters,

tiqui canones servis edicunt, <sup>C. si quis
Serv. 17. q. 4.</sup> ne se dominis subtrahant, generale est, et eorum errori oppositum, qui omnem subjectionem tam privatam quam publicam rejiciebant, ut pugnantem cum Christiana libertate.

XXX. Præter perfectam servitutem, de qua jam egimus, sunt et imperfectæ, ut quæ aut in diem sint, aut sub conditione, aut ad res certas. Talis est libertorum, statu liberorum, nexorum, addictorum, ascriptorum glebæ, septem annorum servitus apud Hebræos; et altera ad Jubilæum usque: Penestorum apud Thessalos; eorum, quos manus mortuas vocant, ac postremo mercenariorum: quæ discrimina aut a legibus aut a pactionibus pendent. Imperfecta servitus naturaliter etiam esse videtur ejus, qui altero parente liberæ, altero servilis conditionis sit natus, ob eam quam supra diximus causam.

XXXI. Publica subjectio est, qua se populus homini alicui, aut pluribus hominibus, aut etiam populo alteri in ditionem

Theodos. pag. 451. et seqq. Tom. 1. J. B.]

* *Extra eam non est jus parentibus prolem suam cuiquam addicere*] Ita et Carolus Calvus statuit cap. xxiv. Edleti Pistis.

* *Ex ipsa alimentorum et eorum quæ vitæ necessaria sunt præbitione*] Vide Leonem Afrum Lib. vi. de Barca. (Pag.

599. Ed. Elzevir.)

* *Ne se dominis subtrahant*] Vide infra Lib. III. c. vii. § 6.

* *Mercenariorum*] Inter quos ii, qui in Angliâ *apprentitii* dicuntur, durante disciplinæ suæ tempore, proxime ac servilem conditionem accedunt. [Vide Thom. Smith, *De Republ. Anglic. Lib.* III. cap. 10. J. B.]

is a general rule only, and delivered in opposition to the error of those who rejected all subjection both private and public, as contrary to Christian liberty.

XXX. Besides complete slavery, of which we have now spoken, there are imperfect kinds of slavery; as those which are for a time; or under a condition; or to perform certain work. Such is the state of *liberti*, freedmen; *statu liberorum**, manumitted by testament under a pendent condition; *nexi*, slaves for debt; *addicti*, slaves by sentence of a judge; *ascripti glebæ*, serfs conveyed with the land; and the slavery among the Hebrews for seven years, and that which lasted till the Jubilee. So the *Penestæ* of Thessaly; so what are called *mortuus manus*, villein tenants; and finally, mercenaries; which differences depend on law or on compacts. Also by the Natural Law the condition of those, one of whose parents is of free and the other of servile condition, seems to be an imperfect slavery, for the reasons given above.

XXXI. That is public subjection, in which a people gives itself

* I have taken Gronovius's explanations of these various kinds of imperfect slavery. W. W.

dat. Formulam talis subjectionis in exemplo Capuæ supra adduximus. Similis est illa populi Collatini: *Deditiōne vos populum Collatinum, urbem, agros, aquam, terminos, delubra, utensilia, divina humanaque omnia in meam populique Romani ditionem? Dedimus. Et ego recipio.* Quo alludens Plautus *Amphitruone* ait (Act. I. Scen. i. vers. 102, 103):

^aDeduntque se, divina humanaque omnia, urbem, et liberos

In ditionem atque in arbitratum cuncti Thebano populo.

Persæ hoc vocabant aquam et terram dedere. Sed hæc perfecta subjectio est: sunt et aliæ minus perfectæ, aut habendi modo, aut quoad imperandi plenitudinem, quarum gradus peti possunt ex his, quæ supra a nobis dissertata sunt.

Lib. I. 3.

XXXII. Ex delicto subjectio etiam non accedente consensu nascitur, ^bquoties qui meruit libertatem amittere, ab eo cui pœnæ exigendæ jus est, in potestatem vi redigitur. Cui autem jus sit pœnæ exigendæ, videbimus infra. Possunt autem hunc in modum subjici non singuli tantum privata subjectione: ^cut Romæ qui ad dilectum non respondebant, et incensi: postea et feminæ, quæ se servo alieno junxissent: sed et populi

Cic. pro Cœc.
c. 34.

^a *Deditique se, divina humanaque omnia*] Id Persæ vocabant *terram et aquam dedere.*

^b *Quoties qui meruit libertatem amittere*] Ut socii illi Ulyssis *Ægyptios* prædati, de quibus *Homerus Odysseæ* ξ. (vers. 271, 272):

^a *Εἴθε τιμῶν πολλοὺς μὲν ἀνέκτανον ἑξῆς χαλκῷ.*

Τοὺς δ' ἀγαγὼν ζῶντες, σφέσιον ἐργάζεσθαι ἀνέγκαν.

Partem igitur nostrum sicellicibus obruncarunt:

Partem etiam vivos ad opus traxere coactum.

Sic Apollinem Jupiter cum in tartarum

into subjection to one man, or to many, or to another people. We have above given the formula of such a subjection, in the case of Capua. (B. I. c. iii. § viii.) So the formula used in the case of the Collatine people: See Livy: to which Plautus alludes. The Persians call this presenting earth and water. There are other modes of public subjection less perfect, either as to the mode of possessing such subjects, or as to the plenitude of authority; the degrees of which may be sought in what we have said above (B. I. c. iii.).

XXXII. Subjection from delict or delinquency, may arise without preceding consent, when he who has deserved to lose his liberty is reduced by force into the power of him who has a right to punish him. Who has the right to punish, we shall hereafter see. (B. II. c. xx. § iii.) And in this way, not only may individuals be reduced into private subjection; (as at Rome those who did not appear to answer to a charge of delict, and those who had made a false return of their property; and afterwards, women who had married the slave

publica ex publico delicto. Hoc interest, quod populi servitus per se perpetua est, quia successio partium non impedit, quominus unus sit populus. At singulorum servitus pœnalis personas non egreditur; quia noxa caput sequitur. Utraque autem servitus, tam privata, quam publica, pœnalis esse potest, aut perfecta aut imperfecta pro modo meriti et inflictæ pœnæ.

De servitute vero, tam privata, quam publica, quæ ex jure gentium oritur voluntario, infra dicendi erit locus, ubi ad effectus belli erit ventum.

deicere vellet, exoratus a Latona servituti addixit: habet Apollodorus libro III. (c. 10. § 3).

^c *Ut Roma qui ad dilectum non respondebant*] Apud Lycios fures. Ni-

colaus Damascenus. (pag. 517. Excerpt. Peiresc.) Apud Wisigothos multi aliorum criminum damnati, ut ex eorum legibus apparet.

of another master;) but also peoples might be reduced into public subjection for a public delict. There is this difference, that the slavery of a people is of itself perpetual, because the succession of parts does not prevent its continuing to be one people. But the slavery of individuals does not go beyond the person; because the consequences of the crime follow the criminal. But both kinds of slavery, public and private, may be penal, whether it be perfect or imperfect, according to the nature of the crime and the punishment.

Of the slavery both private and public which arises from the instituted Law of Nations, we shall have an opportunity of speaking hereafter, when we come to the effects of war. (B. III. c. vii.)

CAPUT VI.

DE ACQUISITIONE DERIVATIVA FACTO HOMINIS, UBI DE ALIENATIONE IMPERII, ET RERUM IMPERII.

- | | |
|--|--|
| <p>I. <i>Ut alienatio fiat, quid requiratur in dante :</i></p> <p>II. <i>Quid in accipiente.</i></p> <p>III. <i>Imperia alienari posse interdum a rege, interdum a populo.</i></p> <p>IV. <i>Imperium in partem populi alienari parte invita a populo non posse.</i></p> <p>V. <i>Nec ipsam partem in se imperium posse alienare, nisi in summa necessitate.</i></p> <p>VI. <i>Causa diversitatis.</i></p> <p>VII. <i>Imperium in locum posse alienari.</i></p> <p>VIII. <i>Rejicitur sententia, statuens ob utilitatem aut necessitatem recte a rege imperii partes alienari.</i></p> | <p>IX. <i>Inféudationem et oppignorationem sub alienatione contineri.</i></p> <p>X. <i>Etiam ad alienandas jurisdictiones minores requiri populi consensum, aut specialem, aut per consuetudinem.</i></p> <p>XI. <i>Patrimonium populi a regibus alienari non posse.</i></p> <p>XII. <i>Distinguendas res, quæ in fructu sunt patrimonii, a rebus patrimonii.</i></p> <p>XIII. <i>Partes patrimonii oppignorari a regibus quatenus possint, et cur?</i></p> <p>XIV. <i>Testamentum alienationis esse speciem et juris naturalis.</i></p> |
|--|--|

I. 1 **A**CQUISITIONE derivativa nostrum fit aliquid facto hominis aut legis. Homines rerum domini, ut dominium, aut totum, aut ex parte ¹transferre possint, juris est naturalis post introductum dominium: inest enim hoc in ipsa domini, pleni scilicet, natura. Itaque Aristoteles: ὅπος τοῦ οἰκεῖον εἶναι, ὅταν ἐφ' αὐτῇ ἢ ἀπαλλοτριῶσαι proprietas definitio est, ubi penes nos est jus alienandi. Duo

¹ Rel. v.

¹ Confer, in hanc rem, PUFENDORFIUM nostrum, *De Jure Nat. et Gentium*, Lib. iv. cap. 9. J. B.

CHAPTER VI. *Of acquisition derivative, by the act of man; and herein of the alienation of the Sovereignty, and of its accompaniments.*

I. 1 Things become ours by derivative acquisition, by the act of man, or by the act of the law. That those who are the owners of things may transfer the ownership, either the whole or in part, is a part of Natural Law, when ownership has been introduced: for this is a part of the nature of plenary ownership. So Aristotle.

But two things are to be noticed; one, in the giver, one, in the

tamen notanda sunt, alterum in dante, alterum in eo, cui datur. In dante, non sufficere actum internum voluntatis, sed simul requiri aut verba, aut alia signa externa: quia actus internus, ut alibi diximus, non est congruens naturæ societatis humanæ. Soto iv. q. 5.
a. 1.

2 Ut vero traditio etiam requiratur, ex lege est civili: quæ, quia a multis gentibus recepta est, jus gentium improprie dicitur. Sic alicubi usurpatum videmus, ut professio apud populum, aut magistratum, et relatio in acta requiratur; quæ omnia ex jure esse civili certissimum est. Actus autem voluntatis, quæ signo exprimitur, intelligi debet ^avoluntatis rationalis. Less. II. 3.
dub. 3.

II. Vicissim in eo, cui res datur, seposita lege civili, requiritur naturaliter voluntas accipiendi, cum suo signo: quæ voluntas ordinarie sequitur dationem, sed potest et præcedere, puta si quis quid dari, aut concedi sibi petierat: censetur enim durare voluntas, nisi mutatio appareat. Cetera quæ tum ad juris concessionem, tum ad acceptionem requiruntur, et quomodo fieri utrumque possit, infra in capite de promissis tractabimus: nam in hoc ^balienandi et promittendi par est ratio, jure quidem naturali.

^a *Voluntatis rationalis*] Cassiodorus, II. 11. *Alienatio rerum solidum de-*

siderat habere judicium.

^b *Alienandi et promittendi par est*

receiver. In the giver an internal act of the will does not suffice; but there are required besides, either words or external acts; because a mere internal act, as we have said elsewhere, is not congruous to the nature of human society.

2 That tradition (delivery) also is required, is a matter of Civil Law; which, because it is received by many nations, is improperly called a part of *Jus Gentium*. So in other places we find the usage to be, that a declaration before the people or the magistrate, or a registry of the gift, is required; which it is quite certain are matters of the Civil Law.

An act of the will expressed by a sign must be understood to mean, of a rational will.

II. On* the other side, in him to whom the thing is given, there is required, setting aside the Civil Law, by Natural Law, the will of accepting, with its sign: which will ordinarily follow the giving; but may precede it; as for instance if the receiver had asked that the thing be given, or granted: for such a will is supposed to continue to exist, except some change appear.

* See *E. M.* 699.

III. Sicut autem res aliæ, ita et imperia alienari ²pos-
sunt ab eo, cujus in dominio vere sunt, id est, ut supra osten-
dimus, a rege, si imperium in patrimonio habeat: alioquin ^ca
populo, sed accedente regis consensu; quia is quoque jus
aliquod habet, quale usufructuarius, quod invito auferri non
debet. Et hæc quidem procedunt de toto imperio summo.

IV. In partis alienatione aliud insuper requiritur, ^dut
etiam pars, de qua alienanda agitur, consentiat. Nam qui in
civitatem coeunt, societatem quandam contrahunt perpetuam et
immortalem, ratione partium, quæ integrantes dicuntur: unde
sequitur has partes non ita esse sub corpore, ut sunt partes
corporis naturalis, quæ sine corporis vita vivere non possunt,
et ideo in usum corporis recte absciuntur. Hoc enim cor-
pus, de quo agimus, alterius est generis, voluntate contrac-
tum scilicet; ac propterea jus ejus in partes ex primæva vo-

ratio] Ideoque etiam dona absentibus
per internuntios mitti possunt, ut Ser-
vius notat ad illud ix. *Æneidos*, Cum
jungeret absens. (vers. 361.)

^b Vide PUFENDORF. Lib. viii. cap.
5. § 9. et seqq. J. B.

^c *A populo*] Bal. et Oldradus in c.
intellecto. de jurejurando. Idem Bal-
dus cons. 327. n. 7. Cardinalis Thus-
chus p. p. concl. 40. n. 1. et concl. 694.
Exempla apud Haræum tomo ii. in an-
no c1o lxxvi. et Guicciardinum libro

xvi.

^d *Ut etiam pars, de qua alienanda
agitur, consentiat*] Gall. ii. de pace
publica, c. xv. n. 14. vide Serranum in
Carolo Sapiente, (Pag. 194. Ed. Paris.
1627) et eundem in Francisco I. ubi de
Burgundia sermo. (Pag. 585.)

^e *Nisi evidenter se aliter servare non
possit*] Confer quæ infra hoc libro c.
xxiv. § 6. Hac de causa absolutus a
Spartanis Anaxilans, qui Byzantium
fame cogente dederat. Xenophon

The other things which are required for the conveyance of a right
and for acceptance of it, and how each may be done, we shall treat of
below, in the Chapter on Promises: for the right of alienating and
of promising are the same, at least by Natural Law.

III. As other things may be alienated, so may Sovereign autho-
rity, by him who is really the owner, that is, as we have said above
(i. iii. § xii.), by the king, if the authority is patrimonial: otherwise, by
the people, but with the consent of the king; because he too has his
right, as tenant for life, which is not to be taken away against his will.
And so much of the whole sovereign authority.

IV. In the alienation of a part of the sovereignty, it is also re-
quired that the part which is to be alienated consent to the act. For
those who unite to form a State, contract a certain perpetual and
immortal society, in virtue of their being integrant parts of the
same; whence it follows that these parts are not under the body in
such a way as the parts of a natural body, which cannot live without

luntate metiendum est, quæ minime credi debet talis fuisse, ut jus esset corpori partes et abscondere a se, et alii in ditionem dare.

V. Sic vicissim parti jus non est a corpore recedere, nisi evidenter se aliter servare non possit: nam, ut supra diximus, in omnibus iis, quæ humani sunt instituti, excepta videtur necessitas summa, quæ rem reducit ad merum jus naturæ. Augustinus, *De Civit. Dei*, Lib. xviii: *In omnibus fere gentibus quodammodo vox naturæ ista personuit, ut subjugari victoribus mallent, quibus contigit vinci, quam bellica omnifaria vastatione deleri.* Itaque in juramento Græcorum, quo Græci qui se Persis subiecissent devovebantur, additum fuit, *μη ἀναγκασθέντες· nisi plane coacti.* Cap. 2. Herod. vii. 132.

VI. Atque hinc satis intelligi potest, cur hac in re majus sit jus partis ad se tuendam, quam corporis in partem: quia

Historia Græca 1. (c. 3. § 12.) Anastasius Imperator etiam gratias agit præfectis, qui Martyropolim Persis dederant, quia defendi nequibat. Procop. *περί κτισμάτων*. (Lib. iii. c. 2.) Idem Procopius iv. *Gothicorum*: *λίμῳ γὰρ οὐκ ὀίδεν ἢ ἀρετῇ συνοικίεσθαι, πεινῇν τε καὶ ἀνδραγαθίεσθαι οὐκ ἀνεχομένης τῆς φύσεως· cum fame habitare virtus recusat, nec fert natura, ut iidem et enuriant et agant fortiter.* (Cap. 23.) Et apud Annam Comnenam libro v.

epistola Cephalæ de Larissa obsessa ad Imperatorem Alexium: *ἀνάγκη δουλεύοντες (καὶ τί γὰρ δεῖ πρὸς φύσιν καὶ τὴν ἐκ ταύτης τυραννίδα ποιεῖν;) γνώμην ἔχομεν τὸ φρούριον παραδόναι τοῖς ἐγκειμένοις καὶ φανερώς ἀποκνύγουσιν·* *Necessitati servientes (quid enim contra vim naturæ agi potest?) constituimus oppidum tradere iis, qui nos non obsident tantum, sed, quod manifestissimum est, strangulant.* (Cap. 4.)

the life of the body, and therefore may rightly be cut away for the utility of the body. The body of which we speak is of another kind, namely a voluntary combination. And thus its right over its parts is to be measured by its primeval will; and this must not be supposed to have been such that the body should have the right of cutting off parts from itself, and giving them into the authority of another.

V. And in like manner on the other hand, a part has not a right to withdraw from the body, except evidently it cannot otherwise preserve itself: for, as we have said, in every thing of human institution the case of extreme necessity is to be excepted, which reduces the matter to mere Natural Law. So Augustine. So in the oath of the Greeks, in which those who had submitted to the Persians were devoted to severe punishment, with the reservation, *Except they had been plainly compelled.*

VI. And hence it may be sufficiently understood, why, in this matter, the part has a greater right to protect itself than the body has

pars utitur jure * quod ante societatem initam habuit, corpus non item. Nec dicat mihi aliquis, imperium esse in corpore tanquam in subjecto, ac proinde alienari ab eo posse ut dominium. Est enim in corpore, ut subjecto adæquato, non divisibiliter in plura corpora, sicut anima est in corporibus perfectis. Necessitas autem, quæ ad jus naturæ rem reducit, hic locum habere non potest; quia in eo jure naturæ usus quidem comprehendebatur, ut esus, detentio, quæ sunt naturalia, at non alienandi jus, quod facto humano introductum est, atque ideo inde mensuram accipit.

VII. At imperium in locum, id est, pars territorii, puta non habitata aut deserta, quo minus a populo libero alienari possit, aut etiam a rege, accedente populi consensu, quid obstet, non video: nam populi pars, quia liberam habet voluntatem, jus quoque habet contradicendi: at territorium, et totum, et ejus partes sunt communia populi pro indiviso, ac proinde sub arbitrio populi. At imperium in populi partem si alienare populo non licet, ut jam diximus, multo minus regi

* Argumentum istud, ut et sequens, nititur rationibus non minus falsis, quam subtilibus: ut ostendimus in Notis nostris Gallicis. Omnino potest Civitas,

summa necessitate urgente, partem aliquam, non quidem alienare, ipsa invita, sed deserere, ita tamen ut sinat eam, si possit, suis ipsius viribus sese tueri et

over a part*; because the part uses a right which it had before the society was formed, and the body does not. Nor must any one say to me that the sovereignty resides in the body as an attribute in its subject, and therefore may be alienated by it as ownership may. For it resides in the body as in an adequate subject, not divisible into several bodies, as the soul or life resides in perfect bodies. But the necessity which reduces the thing to Natural Law cannot have place with regard to the body: for in Natural Law, some things are comprehended, as consuming a thing by eating, and retaining possession of a thing, which are natural operations; but not alienation, which is introduced by the act of man, and takes its measure from that.

VII. But sovereignty over a locality, that is, a part of the territory, say an uninhabited or deserted part, may, so far as I see, be alienated by a free people, or by the king with the consent of the people. For a part of the people, because it has free will, has also the right of refusing consent; but the territory, both the whole and its parts, are

* Gronovius, in his Notes, is very impatient of this discussion of Grotius, and says that it tends to make the claims to kingdoms eternal: as when the French deny that Francis the First, as a captive, could cede to Charles the Fifth the kingdom of Naples, the dukedom of Savoy, and the Belgian provinces.

imperium etsi plenum habenti, attamen non plene, ut supra distinximus.

VIII. Quare subscribere non possumus jurisconsultis, qui ad regulam de non alienandis imperii partibus adjuiciunt exceptiones duas, de publica utilitate, et de necessitate: nisi hoc sensu, ut ubi eadem est utilitas communis, et corporis, et partis, facile ex silentio etiam non longi temporis, consensus et populi, et partis intervenisse videatur, facilius vero si etiam necessitas appareat. At ubi manifesta est in contrarium voluntas, aut corporis, aut partis, nihil actum debet intelligi, nisi, ut diximus, ubi pars a corpore coacta est abscedere.

Belluga in Pr. Spec. in Rub. 8 p. 3. et 4. Roeh. de Curt. de Cons. q. 5. col. 6. Tom. 1. et alii alleg. a Vasq. l. 4.

IX. Sub alienatione merito comprehenditur et infeudatio, sub onere commissi ex feloniam aut deficiente familia. Nam et hæc est conditionalis alienatio. Quare videmus a pluribus populis irritas habitas ut alienationes, ita infeudationes regnorum, quas populis inconsultis reges fecerant. Populum autem consensisse intelligimus, sive totus coit, quod

Smith. de Rep. Ang. l. 2. Buch. in Balliol. Froiss. l. 214. et 246. Monstrelet in Hist. c. 24. & Gulce. lib. xvi.

defendere. Hac ratione æquale jus est utrimque, ut esse debet. Sed fusius id omne exposuimus in dictis Notis. *J. B.* ¹ *Irritas habitas ut alienationes, ita infeudationes* Et remissiones homagii. Vide Cromerum *Polonicorum* xxv.

common to the people, *pro indiviso*, as a whole, and therefore subject to its will. But if a people cannot alienate the sovereignty of a part of the people, as we have said, much less can a king, though having full sovereignty, but not in a full manner, according to the distinction explained above.

VIII. Wherefore we cannot agree with jurists who, to the rule of not alienating the parts of the empire, add two exceptions, public utility, and necessity; except in this sense, that when the common utility of the body and of the part is the same, the consent both of the people and of the part may seem, even by a silence of no long time, to be given; and more easily still, if necessity appear. But when the will, either of the body or of a part, is manifestly on the contrary side, nothing ought to be understood as done, except, as we have said, when a part is compelled to secede from the body.

IX. Under alienation is rightly comprehended also *infeudation*, giving the kingdom as a fief to a superior, with the power of taking possession of it if the holder commit felony, or if his family fail*. And hence we see that by most peoples, infeudations, as well as alienations, are held void when made by the kings without consulting

* As king John of England executed an infeudation of his kingdom to the Pope. *Gronov.*

olim apud Germanos et Gallos fieri solebat, sive per legatos partium integrantium mandatu sufficiente instructos. ⁵Nam facimus et quod per alium facimus. Sed nec pignori dari pars imperii poterit, nisi consensu simili: non ea tantum ex causa, quod ex pignoris datione sequi alienatio soleat, sed quod et rex teneatur populo ad exercendum per se summum imperium, et populus partibus suis ad conservandum hoc exercitium in sua integritate, cujus rei gratia in societatem civilem coitum est.

X. Minores vero functiones civiles quo minus populus etiam jure hereditario possit concedere nihil obstat, cum ea corporis summique imperii integritatem nihil imminuant. Inconsulto vero populo rex id non potest, si maneamus intra terminos naturales: quia juris temporarii, quale est regum electorum, aut lege succedentium ad imperium, ⁴effectus nisi pariter temporarii esse non possunt. Potuit tamen populi

Cravet. Cons.
894. num. 2.
Zoannet. de
Rom. Imp.
n. 162.

⁵ Nam facimus et quod per alium facimus] Sic in Imperio Germanico in alienationibus Electorum consensus ex more et pactis pro consensu est ordinum. [De eo non adsestuntur Recentiores et optimi Scriptores, qui Jus Publicum Germanicum exponunt. *J.B.*

⁴ Ratio ista non usquequaque vera est. In eo res vertitur, an Populi consensus hinc juste præsumi queat. Sed

de hoc diximus in Notis Gallicis ad hunc locum. *J.B.*

^h Oppida aut regiones totas] Ut a Dario Sylosonti urbem et insulam Samiorum. [Exemplum istud non quadrat. Darius expulit tantum Mæandrium, qui regnum occupaverat, excluso Sylosonte, Polycratis fratre. Vide HERODOTUM, Lib. III. cap. 139. et seqq. Sed idem Darius principibus viris, quos secum ex

the people. The consent of the people is understood to be given, whether it meet as a whole, which was formerly the usage among the Germans and Gauls, or by certain representatives of the integrant parts, invested with sufficient powers. For what we do by others we do ourselves. Nor can a part of the empire be *oppignorated* or put in pawn, except with similar consent; not only because oppignoration is commonly followed by alienation, but also, because the king is bound to the people to exercise the sovereign authority himself, and the people is bound to its parts to preserve this exercise in its integrity; for which purpose the members of the civil society came together.

X. To concede subordinate civil functions to persons, even with the right of hereditary succession, is what a people may do; since such concessions do not trench upon the integrity of the body politic and the sovereignty. But the king cannot do this without consulting the people, if we confine ourselves within the limits of Natural Law: for a temporary right, such as that of an elective or hereditary king, can only have temporary effects. But this right may be given to kings,

ut expressus consensus, ita tacitus consuetudine introductus, qualem nunc passim vigere cernimus, id jus regibus tribuere. Eo jure usos olim reges Medos et Persas, ^boppida aut regiones totas perpetuo jure tenendas donasse, passim in historiis legimus.

XI. ¹Patrimonium quoque populi, cujus fructus destinati sunt ad sustentanda reipublicæ aut regiæ dignitatis onera, ^{5k}a regibus alienari, nec in totum, nec in partem potest. Nam et in hoc jus majus fructuario non habent. Nec admitto exceptionem, si res modicum valeat, quia quod meum non est, ejus nec exiguam partem alienare mihi jus est: sed in rebus modicis, quam in magnis, consensus populi ex scientia et ex silentio facilius præsumitur. Quo sensu et ad res patrimonii publici aptari possunt, quæ de necessitate et utilitate publica, in alienandis imperii partibus, supra diximus, tantoque magis, quia momenti minoris res hic vertitur. Est enim patrimonium imperii causa constitutum.

Alberic. in c. Intellect. de Jurisjur. Bart. in l. 3. § 4. D. quod vi. Cornei in fr. de Excecl. Reg. q. 4. Lons. all. a Vasq. c. 5. Natta Cons. 367. Bonif. Reg. cons. 40. n. 43.

Jonia et Æolide duxerat, singulis ipsarum urbium, quibus eos præfecerat, perpetua dedit imperia, referente CORN. NEPOTE, Themist. c. 10. J. B.]

¹ Patrimonium quoque populi, cujus fructus sunt destinati ad sustentanda reipublicæ aut regiæ dignitatis onera] Veteres Græci τεμένη vocabant partem agri publici concessam regibus. Exemplum habes apud Homerum de Bel-

lerophonte apud Lycios Iliados γ. (vers. 194) de Meleagro Iliados λ. (vers. 573) de Glaucio Lycio Iliados μ. ubi scho-liastas vide. (vers. 313.)

⁵ Confer PUFENDORFIUM nostrum, De Jure Nat. et Gent. Lib. VIII. cap. 5. § 8. et 11. J. B.

^k A regibus] Sine ordinum consensu, Exemplum apud Thuanum libro LXIII. in anno cilo IC LXXVII.

not only by express consent, but by tacit assent introduced by usage, such as we now see commonly prevail. And so we perpetually read in history of the Median and Persian kings giving towns or provinces as possessions to be held for ever.

XI. The patrimony of a people, the produce of which is destined to support the burthens of the republic or of the royal dignity, may not be alienated by kings, neither in the whole nor in part. For in this too they have only a life interest. Nor do I admit the exception, If it be a thing of small amount; for of what is not mine, I may not alienate even a small part. But in things of small amount, the consent of the people may be presumed from its knowledge and silence, rather than in great matters. In which sense we may also apply what we have said above on the subject of alienating the parts of the sovereignty, to the case of the public patrimony; and the more, inasmuch as a matter of smaller amount is here involved; for the patrimony is constituted [not on its own account but] for the sake of the State.

XII. Sed in eo falluntur multi, quod res, quæ in fructu sunt patrimonii, cum rebus patrimonii confundant. Sic jus alluvionum in patrimonio esse solet, ipsæ res quas fecit alluvio in fructu: jus vectigalia exigendi in patrimonio, pecunia ex vectigalibus procedens in fructu: jus confiscandi in patrimonio, fundi confiscati in fructu.

XIII. Partes autem patrimonii pignori opponi ex causa possunt a regibus, qui plenum habent imperium, id est, qui jus habent ex causa tributa nova indicendi. Nam sicut populus tributa ex causa indicta solvere tenetur, ita et rem ex causa pignori oppositam luere. Luitio enim ista tributi quædam est species. Est autem populi patrimonium regi, pro debitis populi, pignoris jure obligatum. Potest autem pignori dari etiam res mihi pignorata. Quæ autem dicta sunt a nobis hactenus, ita locum habent nisi lex imperio addita, aut regis, aut populi potestatem magis aut auxerit aut contraxerit.

XIV. 1 Illud quoque sciendum est, cum de alienatione agimus, sub eo genere nobis etiam testamentum comprehendere.

L. Græpe 13.
§ cum Pign.
2. de Pignor.

⁶ Confer quæ diximus ad PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. iv. cap. 10. præsertim in altera Editione. *J. B.*

¹ *Gen.* xv. 2] Habes apud Sophoclem *Trachiniis* (vers. 1164) testamentum Herculis, apud Euripidem *Alcestidis*, (*Alc.* 282. et seqq.) et apud Homerum

Odyssee p. (vers. 79) Telemachi donationem mortis causa, quæ et ipsa testamentum quoddam est. Est apud Homerum etiam voluntas ultima de rebus agendis, ut ex Andromaches et Penelopes verbis ostendit Plutarchus. [*De Poësi Homer.* p. 74. Ed. Barnes.] Alia veterum testamentorum exempla

XII. But many persons run into error by confounding the annual income of the patrimony with the patrimony itself. Thus the right to alluvial accession generally belongs to the patrimony; the things alluvially added are part of income; the right of receiving the taxes is in the patrimony; the annual produce of the taxes is income; the right of confiscation is in the patrimony; the property confiscated is income.

XIII. But the parts of the patrimony may be oppignorated, for cause arising, by kings who have plenary sovereignty; that is who have the right, for cause arising, of imposing new taxes. As the people is bound to pay taxes imposed for good cause, so is it to loose a thing pawned for good cause: for such loosing of a thing pawned is a sort of tax. And the patrimony of the people is [in this case] pledged to the king for the debts of the people. And I may oppignorate things pledged to me.

What we have hitherto said holds, except there be a law, besides

Quamquam enim testamentum, ut actus alii, formam certam accipere possit a jure civili, ipsa tamen ejus substantia cognata est dominio, et eo dato juris naturalis. 'Possum enim rem meam alienare non pure modo, sed et sub conditione; nec tantum irrevocabiliter, sed et revocabiliter, atque etiam retenta interim possessione et plenissimo fruendi jure. Alienatio autem in mortis eventum, ante eam revocabilis, retento interim jure possidendi ac fruendi, est testamentum. Vidit hoc recte Plutarchus, qui cum a Solone dixisset permissam civibus testamenti factionem, addit: τὰ χρήματα, κτήματα τῶν ἐχόντων ἐποίησεν effecit, ut res cuique suae propriae et in pleno dominio essent. Quintilianus pater in declamatione: *Potest grave videri etiam ipsum patrimonium, si non integram legem habet, et cum omne jus nobis in id permittatur viventibus, auferatur morientibus.* Hoc jure Abrahamus, si sine liberis decessisset, res suas Eliezero relicturus fuerat, ut indicat locus ¹Gen. xv. 2.

2 Quod vero alicubi externis testamentum facere non

attulimus supra libro i. cap. 3. § 12. in textu et annotatis. Hebraeis unitata testamenta apparet Deut. xxi. 16: Sirachida capite xxxiii. 25. [In testamento Herculis et Alcestidis, quod vocat Auctor noster, nil de bonis statuitur: sed tantum mandata quaedam dantur. At

est donatio quaedam mortis causae, in *Alcestide* EURIPIDIS; non quidem ab ipsa *Alcestide* facta, sed ab Hercule, vers. 1020. et seqq. quam etiam Auctor pro exemplo adfert, in *Sparsione Florum ad Jus Justinian.* pag. 36. unde forte orta confusio. J. B.]

the general condition of sovereignty, either enlarging or contracting the authority of the people or of the king.

XIV. 1 Also we must observe that when we speak of alienation, we include, in that class of processes, testamentary dispositions. For though a testament, like other acts, may assume a certain form by the Civil Law; yet its substance has a close affinity with ownership, and thus, is under Natural Law. For I may alienate my possession, not only simply, but also under condition; not only irrevocably, but revocably, and even retaining in the mean time possession and the fullest power of enjoying it. But alienation under condition, namely the condition of my death, and revocable before that event, while I retain possession and enjoyment in the mean time, is a Testament. So Plutarch, speaking of Solon's granting the Athenians permission to make a will, adds, in order that every one might have full ownership over his own property. So Quintilian. So Abraham if he had died without children, would have left his property to Eliezer. Gen. xv. 2.

2 The law that in some places strangers are not allowed to make

conceditur, id non est ex jure gentium, sed ex jure proprio illius civitatis, et, ni fallor, ab illa veniens ætate, qua externi quasi pro hostibus habebantur: itaque apud moratiores populos merito exolevit.

Wills, is not a part of *Jus gentium*, but of the peculiar law of such States; and if I am not mistaken, proceeding from that period when strangers were looked upon as enemies; and therefore it has deservedly fallen into disuse among the most civilized nations.

CAPUT VII.

DE ACQUISITIONE DERIVATIVA, QUÆ FIT PER LEGEM, UBI DE SUCCESSIONIBUS AB INTESTATO.

- | | |
|---|--|
| I. <i>Leges civiles quasdam injustas esse, ac proinde dominium non transferre, ut quæ naufragorum bona fisco addicunt.</i> | XIV. <i>Regnum ex populi consensu hereditarium in dubio individuum esse.</i> |
| II. <i>Lege naturæ rem acquiri ei, qui alienum accepit ad debiti sui consecutionem: quod quando locum habeat.</i> | XV. <i>Non durare ultra posteror primi regis.</i> |
| III. <i>Origo successionis ab intestato quomodo a natura.</i> | XVI. <i>Non pertinere ad liberos naturales tantum.</i> |
| IV. <i>An aliquid de bonis parentum liberis debeatur jure naturæ, per distinctionem explicatur.</i> | XVII. <i>In eo mares præferri feminis in eodem gradu.</i> |
| V. <i>In successione liberos defuncti parentibus præferri, et cur.</i> | XVIII. <i>Inter mares præferri natu maximum.</i> |
| VI. <i>Origo vicariæ successionis, quos representatio dicitur.</i> | XIX. <i>An tale regnum pars sit hereditatis.</i> |
| VII. <i>De abdicatione et exheredatione.</i> | XX. <i>Præsumi in regno talem successionem institutam, qualis in aliis rebus in usu erat tempore regni inchoati: sive regnum fuerit allodiale:</i> |
| VIII. <i>De jure liberorum naturalium.</i> | XXI. <i>Sive feudale.</i> |
| IX. <i>Liberis deficientibus, ubi nec testamentum, nec lex certa exstant, bona avita deferenda his, a quibus venerunt, aut eorum liberis.</i> | XXII. <i>Successio linealis cognatica quæ sit, et qualis in ea transmissio juris.</i> |
| X. <i>Bona noviter quæsitæ proximis.</i> | XXIII. <i>Successio linealis agnatica qualis.</i> |
| XI. <i>Legum circa successiones diversitas.</i> | XXIV. <i>Successio qua semper respicitur proximitas ad primum regem.</i> |
| XII. <i>In regnis patrimonialibus qualis sit successio.</i> | XXV. <i>An exheredari possit filius, ne in regnum succedat.</i> |
| XIII. <i>Si ea regna sint individua, præferri maximum natu.</i> | XXVI. <i>An abdicare quis regnum possit pro se et pro liberis.</i> |
| | XXVII. <i>Judicium proprie dictum de successione, nec regis esse, nec populi.</i> |
| | XXVIII. <i>Filius, qui ante patris regnum natus est, post nato præferendum.</i> |
| | XXIX. <i>Nisi alia lege delatum regnum appareat.</i> |

- XXX. *An nepos ex filio priore filio posteriori præferatur, per distinctionem explicatur.*
- XXXI. *Item an minor frater superstes regis majoris fratris filio præferendus sit.*
- XXXII. *An fratris filius regis patruo præferatur.*
- XXXIII. *An nepos ex filio præferatur filius regis.*
- XXXIV. *An minor nepos ex filio nepoti majori ex filia.*
- XXXV. *An neptis ex majore filio præferatur filio minori.*
- XXXVI. *An filius sororis præferendus filia fratris.*
- XXXVII. *An filia fratris majoris fratri minori.*

I. **L**EGE quæ fit acquisitio derivativa, sive alienatio, fit aut lege naturæ, aut lege gentium voluntaria, aut lege civili. De lege civili non agimus, id enim infinitum foret, et præcipuè de bellis controversiæ ex lege civili non definiuntur. Tantum notandum est ^aleges quasdam civiles esse plane injustas, ut quæ bona naufragorum fisco addicunt. Nulla enim

*Auth. Naufr.
post leg. 18.
C. de Furt.*

^a *Leges quasdam civiles*] Ut olim apud Anglos, Armoricos, Siculos. Veteris talis legis in Græcia mentio apud Sopotrum et Syrianum in Hermogenem. (Els *ordres*, pag. 107. *Ed. Venet.* 1609.) Christianus rex Danie, lege de naufragorum bonis confiscandis abrogata, dicebat sibi perisse annua c. aureorum millia; meminît et Brigitta mali hujus moris VIII. 6. et *Speculum Saxonicum* II. 29, de Dania agens, et c. Excommunicationis, de raptoribus. Tum vero Crantzii *Vandalicorum* XIII. 40. XIV. 1: Cromerus *Polonicorum* XXI. (pag. 509. *Ed. Basil.* 1555.)

^b *Spoliare quod genus est nefas*] Adde I. nequid 7. D. de incendio, ruina, naufragio. Nicetas Choniates in Andronici imperio vocat ἰθὺς ἀλογιστῶν, (Lib. II. cap. 3): vide et Cassio-

dorum IV. 7. Quid in mentem venit Bodino, ut talia defenderet? Idem scilicet qui Papinianum reprehendit, quod mori quam conscientiam lædere maluerit. [At vero Bodinus occupationem bonorum naufragio amissorum, vocat barbarum quid, et crudelitatem tuam in cives, tum in peregrinos, Lib. I. cap. 10. *de Republ.* Edit. Latin. Francof. 1622, ubi hæc addit: *Jus queris? Error jus facit: at si non peccatur errore, sed scientia, scelus est, quod erroris specie præstenditur.* Pag. 267. Quod spectat Papinianum, ait Bodinus, illum Ictum fortiter magis, quam sapienter, egisse: qua de causa ita statuat, videre poteris Lib. III. c. 4. pag. 458, 459. *J. B.*]

¹ Ejeci hinc voces istas, [id quod meum nondum est, sed mihi dari debet, aut] quæ, quamquam in omnibus Edd.

CHAPTER VII. *Of the derivative acquisition which takes place by Law; and herein of succession to intestate property.*

I. The derivative acquisition or alienation which takes place by Law, takes place either by the Law of Nature, or by the instituted Law of Nations, or by the Civil Law. Of the Civil Law we do not treat, for to do so would be an infinite task; and the principal controversies concerning war are not defined by the Civil Law. Only this we may note, that some civil laws are manifestly unjust: as those which confiscate goods thrown on shore by shipwreck. For without any

causa præcedente probabili, dominium alicui suum auferre mera injuria est. Bene Euripides *Helena* (vers. 456):

Ναυαγὸς ἦκω, ξένος, ἀσύλῳτον γένος.

Sum naufragus, ^bspoliare quod genus est nefas.

Quod enim jus habet fiscus (verba sunt Constantini) *in aliena calamitate, ut in re tam luctuosa compendium sectetur?* L. I. C. de
Naufrag. xl.

Dion Prussæensis oratione VII. de naufragio locutus: *μη γὰρ εἴη ποτὲ, ὦ Ζεῦ, λαβεῖν μηδὲ κερδάναι κέρδος τοιοῦτον ἀπὸ ἀνθρώπων δυστυχίας. Absit, o Jupiter, ut lucrum captemus tale ex hominum infortunio.* P. 109 a.

II. 1 Lege naturæ, quæ ex ipsa dominii natura ac vi sequitur, dupliciter fit alienatio, expletione juris et successione. Expletione juris fit alienatio, quoties ¹loco rei meæ, aut mihi debitæ, cum eam ipsam consequi non possum, ^caliud tantundem valens accipio ab eo qui rem meam detinet, vel mihi

legantur, omnino abundant, et sermonem admodum hiuleum efficiunt. Nimirum, ut mihi videor probabiliter conjicere, Auctor statim voluerat dicere, *loco illius, quod meum est, vel quod meum nondum est, sed mihi dari debet, etc.* Postea animadvertit, brevius dici posse: *loco rei meæ, aut mihi debitæ*: quum igitur brevitatis esset studiosissimus, ita quoque mutavit; sed oblitus est delere nonnulla ex iis quæ jam scripserat, et quæ forsan etiam fusiùs concepta erant. Vide infra, Lib. III. cap. xix. § 15. ubi plane eodem modo loquitur, dum huc remittit. J. B.

^c *Aliud tantundem valens*] Vide quæ infra libro III. c. vii. § 6. Sic ipso naturæ jure defendit Hebræos Irenæus, (Lib. IV. c. 49. Mass. 30), quod in compensationem operæ res Ægyptiorum ceperint. *Ægyptii enim, inquit, populi*

erant debitores, non solum rerum, sed et vite suæ. Tertullianus idem tractans secundo adversus Marcionem (Cap. 20): *Reposcunt Ægyptii de Hebræis vasa aurea et argentea. Contra, Hebræi mutuas petitiones institunt, allegantes sibi mercedes restitui oportere illius operariæ servitutis*: et ostendit minus multo exactum quam debebatur. [Adde CLEMENT. ALEXAND. Strom. Lib. I. c. 23. p. 415. Ed. Oxon.] Cum his coherent ea, quæ dicuntur libro III. c. 11. [Delevi, quod jam in contextu positum, repetierat heic Auctor, exemplum Hesionei, ex DIOD. SICULO pettum: ubi tamen, pro *Ἡεσιονεῖς*, legendum *Ἡεσιονεῖς, Εἰσιονεῖς*, ut ad Hygin. Fabul. 155, observavit Munckerus, et dudum antea observaverat Meziriacus, in Ovidii *Epist.* p. 151. T. I. nuperæ Edit. J. B.]

probable preceding cause, to take away from any one his right to his own property is mere wrong. So Euripides, Constantine, Dio Prussæensis. [See.]

II. 1 By the Law of Nature, which follows from the nature and force of ownership, alienation is made in two ways, by legal compensation and by succession.

Alienation takes place by legal compensation, as often as, in the place of a thing which is mine or is owing to me, when I cannot obtain the thing itself, I receive another thing of the same value from

Sylv. in Verb.
Bell. p. 2.
q. 13.

Lib. iv. 71. p.
189.

L. 5. D. de
acq. poss.
ii. § 18.
De vi Bon.
Rapt. xiii.
D. Quod met.
vii. 8.
D. ad l. Jul.
de vi priv.
Thom. 2. 2.
66. art. 5.

L. 54. C. de
decur. l. 12.
C. de ep. et
cler. DD. in
l. 58. § 1. in
fin. D. ad l.
Aquil.

debet. Nam justitia expletrix, quoties ad idem non potest pertingere, fertur ad tantundem, quod est morali æstimatione idem. Dominium autem hoc modo transferri probatur a fine, quæ in moralibus optima est probatio. Neque enim juris mei explementum consequi potero nisi dominus fiam. Frustra enim erit rei detentio, si ea uti pro arbitrio non possum. Antiquum hujus rei exemplum est in historia Diodori; ubi Hesioneus, pro his quæ filiæ suæ ab Ixione promissa non præstabantur, equos ipsius accipit.

2 Legibus quidem civilibus scimus vetitum esse sibi jus dicere; adeo quidem ut vis dicatur, si quis quod sibi debitum est manu reposcat, et multis in locis jus crediti amittat qui id fecerit. Imo etiamsi lex civilis hoc non directe prohiberet, ex ipsa tamen judiciorum institutione sequeretur hoc esse illicitum. Locum ergo habebit quod diximus ubi judicia continue cessant; quod quomodo contingat explicavimus supra: ubi vero momentanea est cessatio, licita quidem erit acceptio rei, puta si alioqui nunquam tuum recuperare possis, aufugiente

* Modo scilicet ille, a quo petitur, sciat, aut scire possit, se debere quod petitur. Deinde frustra hoc fieret, si Creditor non inveniret rationem clam consequendæ, sine ullius injuria, rei

debitæ, aut æstimationis ejus, ita ut factum a Debitore in jure probari non posset. J. B.

* In toto isto argumento confer PUFENDORFIUM, *De Jure Nat. et Gent.*

him who detains or owes what is mine. For expletory justice, when she cannot restore the same thing, has recourse to a thing of the same value, which is in moral estimation the same. That the ownership is transferred in such cases, is proved by the end of the procedure, which in moral cases is the best proof. For I cannot obtain compensation for my right, except I become the owner. My detention of the thing is of no use, if I cannot use it as I choose. So in Diodorus, Hesioneus took the horses of Ixion, as compensation for what he promised his daughter and did not give.

2 By the Civil Law indeed, it is, as we know, forbidden to execute justice for one's self; so that it is called violence, if any one take by act what is owing to him; and in many places he loses the right of a creditor who does so. And indeed if the Civil Law did not directly prohibit this, it would follow from the institution of judicial tribunals that it is unlawful. Therefore the rule that we have laid down holds, when the course of regular justice is continuously interrupted, as we have explained above, (i. iii. 2). When the interruption is momentary, the taking of the thing will be lawful, in case you cannot otherwise recover what is yours; for example, if your debtor be running away. But the establishment of

forte debitore. Sed dominium a judicis additione erit expectandum, quod fieri solet in repressaliis, de quibus infra erit agendi locus. Quod si jus quidem certum sit, sed simul moraliter certum, per judicem juris explementum obtineri non posse, puta quia deficiat probatio; in hac etiam circumstantia cessare legem de judiciis, ²et ad jus rediri pristinum verior sententia est.

Bart. in tr.
Repress. q.
80.

III. Successio ab intestato quæ dicitur, ³posito dominio, remota omni lege civili, ⁴ex conjectura voluntatis naturalem habet originem. Nam quia domini ea vis erat, ut domini voluntate transferri in alium posset, etiam mortis causa, ac retenta possessione, ut supra diximus; si quis voluntatis suæ nullam edidisset testationem, cum tamen credibile non esset ejus eum mentis fuisse, ut post mortem suam bona occupanti cederent, sequebatur ut ejus esse bona intelligerentur, cujus ea esse voluisse defunctum maxime erat probabile. *Defunctorum voluntatem intellexisse*, inquit Plinius junior, *pro jure est*. Creditur autem in dubio id quisque voluisse quod æquissimum

Soto de Just.
q. 3. art. 2.
Cajet. d. q. 66.

Lib. iv. Ep.
10. et Lib. ii.
Ep. 16. et Lib.
v. Ep. 7.

Lib. iv. cap. 11. J. B.

⁴ *Ex conjectura voluntatis naturalem habet originem] Ideo fideicommissa dari possunt ab intestato succedentibus,*

quoniam creditur paterfamilias sponte sua his relinquere legitimam hereditatem, ait Paulus L. conficiuntur. 8. § 1. D. de Jure Codicillorum.

ownership must be waited for till the judge assigns it, as is usual in *reprises*; of which we shall hereafter treat. But if the right be certain, and at the same time it be morally certain that compensation cannot be obtained from the judge; for example, for want of proof; the truer opinion is, that under the circumstances, the law concerning the tribunals ceases, and the matter reverts to the primitive rule.

III. Succession to intestate property, setting aside the Civil Law, has its natural origin in the conjecture of the will of the last possessor. For inasmuch as the force of ownership was such that the property might, by the will of the owner, be transferred to another, even on account of approaching death, and with possession retained, as we have said before; if any one has made no manifestation of his will, and yet it be not credible that he was so minded that his property should after his death come into the hands of any one who should take possession of it; it followed that the property should belong to him to whom it was most probable that the defunct person wished it to belong. As Pliny says, It is a rule of law to understand the will of persons defunct. And in a doubtful case, every one is supposed to have willed that which is most

atque honestissimum est. In hoc autem genere prima est causa ejus quod debetur, proxima ejus quod etiam non debetur, officio congruit.

Franc. Pisci.
de stat. exc.
fm. n. 133.
Mench. in
Auth. novis.
C. de inoff.
test. n. 286.
Tell. Fern. in
l. 10. Taurin.
q. 4.

IV. 1 Disputant Jurisconsulti, an alimenta a parentibus liberis debeantur? Nam quidam sentiunt esse quidem naturali rationi satis consentaneum, ut a parentibus alantur liberi, debitum tamen non esse. Nos omnino distinguendum arbitramur ⁴in voce debiti, quod stricte interdum sumitur pro ea obligatione, quam inducit jus expletorium; interdum laxius, ut significet id quod nisi inhoneste omitti non potest, etiamsi honestas illa non ex justitia expletrice, sed ex alio fonte profisciscatur. Est autem id de quo agimus (nisi lex aliqua humana accedat) debitum illo sensu laxiore. Ita accipio quod dixit Valerius Maximus: *Parentes nos alendo*, inquit, *nepotum nutriendorum debito alligarunt*. Et Plutarchus in libello elegantissimo de prolis amore: *οἱ παῖδες ὡς ὀφείλημα τὸν κληρονόμον ἐκδεχόμενοι*. ⁵*liberi hereditatem ut sibi debitam expectant*. Quia dat formam, dat quæ ad formam sunt necessaria, dictum est Aristotelis: quare qui causa est ut homo existat, is quantum in se est, et quantum necesse est, prospicere ei debet de his quæ ad vitam humanam, id est, naturalem ac socialem, nam ad eam natus est homo, sunt necessaria.

Lib. II. 9.
num. 1.
Tom. II. p.
497 A.

⁴ Distinguendum potius inter tempus, quo liberi non possunt sibi ipsi alimenta querere, et tempus, quo id possunt. Priori tempore, omnino et ex jure stricto parentes liberos alere tenentur: posteriori, non ita tenetur, sed nemo est tamen, cui potius de alimentis prospicere, et bona sua etiam, vel saltem majorem partem, relinquere eos honestum sit. *J. B.*

⁵ *Liberi hereditatem ut sibi debitam*

expectant] Julianus Caesaribus *παῖσι τε γὰρ νόμιμον ἐπιτρέπει τὰς διαδοχὰς*. *Æquum, liberis hereditatem relinquere*. (pag. 334 D. *Edit. Spanhem.*) Etiam filiabus, quas juxta filios heredes parentum fuisse more antiquissimo testatur Jobi historia in fine. Hanc equitatem respiciens Augustinus, ne ab ecclesia quidem recipi vult bona eorum, qui liberos suos exheredabant. Loca sunt libro I. de *Vita Clericorum*, (cap. 3) et ser-

equitable and proper. And in this case, the first claim is that which is strictly due; the next that which, though not strictly due, is conformable to duty.

IV. 1 Jurists dispute whether children have a right to aliment from their parents. For some are of opinion that it is indeed agreeable to natural reason that children should be supported by their parents, but that it is not a debt or due. We make a distinction as to the word *debt* or *due*; which strictly taken, is sometimes taken for the obligation introduced by expletory *jus*; but sometimes, more laxly, that which cannot be decently omitted, though that de-

2 Ea de causa, instinctu scilicet naturali, cetera quoque animantia proli suæ, quantum necesse est, alimenta suppeditant. Unde Apollonius Tyanæus quod ab Euripide erat dictum, (*Androm.* vers. 418):

Philostr. in
Jus Vit.
fl. 14, 15.

Ἄπασι δ' ἀνθρώποισιν ἡ ψυχὴ τέκνα.

Cunctis hominibus liberi vita altera.

Ita emendabat:

Ἄπασι δὲ ζώοισιν ἡ ψυχὴ τέκνα.

Animantibus quasi vita sunt partus sui:

Plurimis sane allatis argumentis quibus insitum hunc affectum probat, quæ videre est apud Philostratum libro VII. capite septimo et octavo: cum quo loco optime consentit is qui est apud Oppianum de venatu tertio, et de piscatu primo. Et in *Dictye* tragedia idem ille Euripides hanc unam omnium legem esse ait, quæ et hominibus inter se, et cum ceteris animantibus communis sit: hinc jurisconsulti veteres liberorum educationem ad jus naturale referunt, id est, ad illud quod cum instinctus naturæ aliis quoque animantibus commendat, nobis ipsa præscribit ratio. *Naturalis stimulus*, ut Justinianus loquitur, id est, *στοργή*, parentes ad liberorum educationem hortatur. Idem alibi: *Filium vel filiam alere patri necesse*

Cap. 14, 15.

Apud Stobæ.
[[81. p. 474.]

Pr. Inst. de
Jur. Nat.
Gen. l. Jur. 1.
§ Jus Nat. 3.
D. de Just. et
Jur.
L. Un. § Tac.
5. ver. elicat.
C. de rei us.
act.
L. ult. C. de
bon. quas
lib. § ips. 5.

mone LII. ad Fratres in Eremito, si tamen id opus Augustini est. Posuit ea Gratianus in causa XIII. quæst. II. (c. 8) et causa XVII. quæst. IV. in fine. (c. 43). Procopius *Persicorum* I: οἱ νόμοι τῷ διαλλάσσειν ἀλλήλοις ἀεὶ ἐν πάσιν ἀνθρώποις μαχόμενοι, ἐνταῦθα ἐν τῇ Ῥωμαίοις καὶ πᾶσι βαρβάροις ξυνίασί τε καὶ ξυνομολογούντες ἀλλήλοις κυρίους ἀποφαίνονται τοὺς παῖδας εἶναι

τοῦ πατρὸς κλήρον. *Leges quæ ceterum inter homines plurimis differentiis invicem pugnant, in hac re tam apud barbaros quam apud Romanos consentiunt atque conspirant, ut liberos dominos pronuntient rerum a patre relictarum.* (Cap. 11.)

Quibus insitum hunc affectum probat] Plinius x. 33. de *Hirundinibus*. In *fetu summa æquitate alternant cibum*.

cency proceeds not from expletory justice, but from some other source. Now what we here speak of is (except there be in addition some human law) a debt or due in the laxer sense. So Valerius Maximus, Plutarch. [See.] That he who gives the form gives what is requisite to the form, is a dictum of Aristotle. Therefore he who is the cause of a man's existence, ought, as far as he can and as far as is necessary, to provide him with the things necessary to human life, that is, natural and social life.

2 So other animals by natural instinct provide for their offspring. Hence Apollonius Tyanæus so amends Euripides, and gives many arguments, which see in Philostratus; and so Appian: and Euripides in the *Dictye*.

Lib. II. 50.
p. 94.

Inst. Orat.
vii. 1.
Frag. iv. 2.

L. Si quis 5.
§ Ergo, 4.
D. de agnosc.
lib.

C. Cum habe-
ret 5. de eo qui
duz. quam
poll. adul.

L. ult § 1.
C. de bon.
quæ, lib. v.
§ 1. 5. 1. 8.
D. de agn.
lib.

est propter ipsam naturam. Diodorus Siculus: ἀγαθὴ γὰρ ἡ φύσις διδάσκαλος ἅπασι τοῖς ζώοις ἐστὶ πρὸς διατήρησιν οὐ μόνον ἑαυτῶν, ἀλλὰ καὶ τῶν γεννωμένων, διὰ τῆς συγγενοῦς φιλοζωίας τὰς διαδοχὰς εἰς αἰδίου ἄγουσα διαμονῆς κύκλον. Optima quippe magistra natura est cunctis animantibus, non tantum ad sui, sed et ad proles suæ conservationem, ut cognata hac caritate continua successio ad æternitatis circulum perveniat. Apud Quintilianum filius, *partem jure gentium peto*. Sallustius testamentum quo filius excluditur impium dixit. Et quia naturale est hoc debitum, ideo etiam vulgo quæsitos alere mater debet.

3 Et quanquam ex damnato legibus concubitu natis nihil relinqui leges Romanæ volebant, sicut et naturalibus ne quid relinquere necesse esset caverat lex ⁵Solonis, canones Christianæ pietatis hunc rigorem correxerunt, qui docent qualibuscumque liberis id recte relinqui, imo si opus sit relinquendum etiam, quod ad alimenta necessarium est. Nec aliter capiendum quod dici solet, legitimam humanis legibus tolli non posse, quatenus scilicet in legitima insunt alimenta necessaria. Nam quod supra est, tolli potest non repugnante natura.

4 Alii autem debent non tantum liberi primi gradus, sed et secundi, si ita res ferat, et ulterioris: quod ostendit Justinianus, cum non filios tantum, sed et qui deinceps sunt, alendos

⁵ Memoria heic fefellit Auctorem nostrum. Solon enim non solvit parentes necessitate aliquid relinquendi na-

tis ex concubitu illegitimo; sed contra liberos naturales solvit necessitate alendorum parentum: Τὸ μὲν τοῖς ἐξ

Hence the old jurists refer the bringing up of children to Natural Law; that is, to that class of things which Instinct recommends to animals, and Reason to man. So Justinian, Diodorus Siculus, Quintilian. Sallust calls a testament in which the son is excluded, *impious*. And since this is a natural due, the mother ought to support her children of which the father is uncertain.

3 And though the Roman Laws directed that those born of a cohabitation condemned by the laws should have no legal inheritance, as the law of Solon provided that it was not necessary to leave anything to natural children; the rules of Christian piety corrected this rigour, and teach that all children may rightly have that left them by their parents, and if need be, should have that left them, which is sufficient to support them. And thus is to be taken what is usually said; that the lawful share of the inheritance (*legitima*) cannot be taken away by human laws: that is, so far as this lawful share implies necessary aliment. For what is more than this may be taken away without

propter ipsam naturam pronuntiat: quod ad eos etiam produ-
citur, qui per mulieres ex nobis veniunt, si aliunde ali non
possunt.

V. 1 Debentur quidem et parentibus alimenta: quod
non legibus tantum proditum est, sed vulgari proverbio <sup>ἅντι-
πελαργεῖν</sup>; adeo quidem ut laudetur Solon, quod qui id non
facerent eos notarit infamia. Sed non hoc sæpe est ordinarium <sup>Diog. Laërt.
in Solon. § 55.</sup>
atque illud quod de liberis diximus; nam liberi cum nascuntur
nihil secum afferunt unde vivant: adde quod vivendum diutius
habent quam parentes: atque ideo sicut honor et obsequium
parentibus debetur, non liberis, ita educatio liberis magis quam
parentibus: quo sensu accipio illud Luciani: καὶ τοί γε ἡ <sup>In Abdic.
Tom. i. p. 731.</sup>
φύσις τοῖς πατράσι τοὺς παῖδας μᾶλλον ἢ τοῖς παισὶ τοὺς
πατέρας ἐπιτάττει φιλεῖν. *Magis natura jubet a parentibus
liberos, quam a liberis parentes diligere.* Et illud Aristotelis: <sup>Ma. Nic. viii.
14.</sup>
μᾶλλον συνφικεῖται τὸ ἀφ' οὗ τῷ γεννηθέντι, ἢ τὸ γεννώ-
μενον τῷ ποιήσαντι. τὸ γὰρ ἐξ αὐτοῦ οἰκεῖον τῷ ἀφ' οὗ.
*Magis afficitur causa gignens erga genitum, quam genitum
erga gignentem. Nam quod ex aliquo ortum est, id ei quasi
proprium est.*

2 Hinc fit, ut etiam citra auxilium legis civilis prima bo-
norum successio liberis deferatur; quia creduntur parentes
illis, ut corporis sui partibus, non tantum de necessariis, sed et

ἐταῖραι γενομένοις ἐπὶ ἀναγκαίαι εἶναι
τοὺς πατέρας τρέφειν etc. ait PLUTAR-
CHUS, in ejus Vit. pag. 90 B. J. B.

ἢ Ἄντιπελαργεῖν] Vide Leonem
Afrum libro IX. de Nerro. (Pag. 388.
Ed. Elzevir.)

transgressing Natural Law.

4 Not only descendants in the first degree, but in the second, if
necessary, and in ulterior degrees, ought to be supported. So Jus-
tinian. And this extends to those who are descendants through females,
if they have no other source of support.

V. 1 Also aliment to parents is due from their children: which
is not only a matter of law, but expressed by a proverbial term refer-
ring to the supposed filial piety of the stork. And Solon is praised for
marking with infamy those who do not discharge this due. But this
is not so ordinarily applicable as the rule concerning children; for
children, when they are born, bring with them nothing on which to live:
add to which, that they have to live longer than the parents have.
Therefore as honour and obedience are due to parents, not to children,
so support is due to children more than to parents. So Lucian and
Aristotle.

2 Hence, even without the aid of the Civil Law, the first rule of suc-

L. Cum Rat.
7. D. de bon.
damn.

Leg. 7. § 1.
D. Si tab.
test.

Lib. v. 9.
num. 2.

2 Cor. xii. 14.

de his, quæ ad vitam suavius honestiusque transigendam pertinent, quam uberrime voluisse prospectum, ab eo maxime tempore, quo ipsi rebus suis frui non possent. *Ratio naturalis*, inquit Paulus Jurisconsultus, *quasi lex quædam tacita liberis parentum hereditatem addicit, velut ad debitam successionem eos vocando*. Papinianus vero: ^h *Non sic parentibus liberorum, ut liberis parentum debetur hereditas. Parentes ad bona liberorum ratio miserationis admittit: liberos naturæ simul et parentum commune votum; id est, liberos hereditas sequitur partim quidem ob præcisum debitum naturale, partim ex conjectura naturali, qua parentes creduntur id velle, ut liberis quam optime prospectum sit. Sanguini honorem debitum reddidit*, ait Valerius Maximus de Q. Hortensio, qui filium minus sibi probatum heredem scripserat. Huc spectat illud Apostoli Pauli: οὐ γὰρ ὀφείλει τὰ τέκνα τοῖς γονεῦσι θησαυρίζειν, ἀλλ' οἱ γονεῖς τοῖς τέκνοις. *Non enim liberi parentibus, sed parentes liberis rem congerere et servare debent.*

^h *Non sic parentibus liberorum, ut liberis parentum debetur hereditas* [Philo de Vita Moïsis III. (Pag. 689 π. Ed. Paris.) ἐπειδὴν ὁ νόμος φύσεώς ἐστι κληρονομεῖσθαι τοὺς γονεῖς ὑπὸ παιδων, ἀλλὰ μὴ τούτους κληρονομεῖν, τὸ μὲν ἀνευκταῖον καὶ παλμφημον ἡσέχασε· Cum lex sit naturæ ut liberi parentibus, non parentes liberis in bona succedant, Moses id quod contra vota parentum malique omnis erat testis silentio. Xenophon libro II. Socraticorum: ὁ μὲν ἀνὴρ τοῖς μέλλουσιν ἵσασθαι παισὶ προκατασκευάζει πάντα ὅσα ἐν οἷσθα συνοίσειν αὐτοῖς πρὸς τὸν βίον,

καὶ ταῦτα οἷς ἂν δύνηται πλεῖστα· Vir is quos habiturus est liberis parat omnia quæ uni fore ad vitam putat, et quidem quam maxima potest in copia. (Cap. 2. § 5).

ⁱ *Ut nepos filii loco succedat*] Quod Hebræi dicunt, filius etiam in sepulchro succedit; item: filii filiorum sunt tanquam filii. (Vide SELDEN. De Successionib. ad Leges Hebr. Lib. I. c. 1 et 2). Meminit ejus juris ut naturalis Jacchides ad Danielelem v. 2: *Æquissimum esse videtur nepotes nepotesque in patris sui locum succedere*, ait Justinianus titulo institutionum de Hereditatibus quæ

cession is, that the goods go to the children; because the parents are believed to have intended to provide for them, as for parts of their own bodies, not only necessaries, but all things which pertain to an agreeable and decent life, and especially after they cease to be able to enjoy their property. So the Jurists Paulus, Papinian. So Valerius Maximus says of Hortensius, when he made his son his heir, though disapproving his character, that *He rendered the due honour to the tie of blood*. So St Paul, 2 Cor. xii. 14.

VI. It is ordinarily the case, that the father and mother provide for their children, and therefore, so long as they are alive, the grandfather and grandmother are not bound to furnish them aliment; but

VI. Quia vero et hoc ordinarium est, ut pater materque liberis suis prospiciant, ideo, dum illi extant, avi aviaque ad alimenta danda teneri non intelliguntur: ubi illi, eorumve alter defecerit, æquum est, ut avus aviaque pro mortuo filio filiaque curam suscipiant nepotum ac neptium: quod et in parentibus longius remotis pari ratione procedit. Atque hinc ortum traxit jus illud, ¹ut nepos filii loco succedat, quemadmodum ^{L. 7. D. de his qui s. v. al. jur. s. L. 2. § 7. D. de exc. cur. Novel. 127. pr.} Ulpianus loquitur. Id Modestinus dixit, τὸν τοῦ πατρὸς ἀποθανόντος τόπον πληροῦν. Justinianus, τὴν πατρῴαν ὑπείκειναι τάξιν. Isæus oratione de Philoctemonis hereditate, hoc ipsum ²vocat ἐπανίεναι. Philo Judæus: ^{Legationes ad Cæsum.} νιωνοὶ γὰρ πατέρων ἀποθανόντων ἐν νιῶν τάξει παρὰ πάπποις καταριθμούνται. *Nepotes parentibus mortuis apud avos filiorum obtinent locum.* Vicariam hanc successionem, ^kquæ per stirpes fit, representationem vocare amant recentiores jurisconsulti; quam valuisse etiam apud Hebræos, divisio agrorum terræ Jacobi filiis ⁷promissæ, aperte satis ostendit. Sicut filius et

ab intestato deferuntur. (§ 6). Pietati id adscribit Eginhardus in *Vita Caroli Magni*. (Cap. 9. *Ed. Schminck*.) κατιόντας εἰς τὸν ἰδίου γονέως τόπον ὑπεισελθεῖν. *Posterius in sui quemque parentis locum subire*, dixit Michael Attalata.

^a Locus est pag. 467. *Ed. Weck*. Ὁ γὰρ νόμος οὐκ ἐὰν ἐπανίεναι, εἰ μὴ υἱὸς καταλίπη γνήσιον. Sed ibi non agitur de successione Nepotis in locum filii, verum de Filii Adoptivi reditu in familiam Patris Naturalis, qui reditus fieri non poterat, nisi ipse in familia Patris Adoptivi reliquisset filium legi-

timum: idque secundum Legem Solonis, quæ legitur integra apud DEMOSTHENEM, *Orat. in Leochar.* pag. 673 B. Adeoque locus omnino alienus est a re, de qua agitur. *J. B.*

^k *Quæ per stirpes fit*] Sic in sortendis urbibus inter Heraclidas Proclo et Eurystheni, ut ab Aristodemo venientibus, una sors fuit contra Temenum et Cresphontem: meminit Apollodorus libro II. (c. 8. § 4). Pansanias (*Messeniac.* c. 3). Strabo Lib. VIII. [pag. 364].

⁷ Posterius Ephraimis et Manassæ non tantum propter *jus representationis* partem habuerunt Terræ promissæ:

when the parents, or one of them, fails, it is equitable that the grandfather and grandmother should undertake the care of the grandchildren for their defunct son and daughter: and this goes on in like manner to parents still further removed. And hence is the origin of that right by which the grandson succeeds in the place of the son, as Ulpian speaks. See Modestinus, Justinian, Isæus, Philo Judæus, Demosthenes. This vicarious succession by family branches, the more recent Jurists call *Representation*. This prevailed among the Hebrews also, as the division of the promised land among the sons of Jacob, plainly shews. [Ephraim and Manasseh, the sons of Joseph, having a lot; but in fact they had *each* a lot, being adopted. *J. B.*]

p. 651 B.

filia proximi sunt cuique, ita et qui ex filio filiae nascuntur, ait Demosthenes oratione adversus Macartatum.

VII. Quæ autem diximus hactenus de conjectura voluntatis, ita locum habent, nisi in diversum indicia suppetant. In hoc indiciorum genere primum habet locum abdicatio, quæ Græcis, tum ¹exhereditatio, quæ Romanis fuit usitata. Ita tamen ut ei, qui mortem peccatis suis meritus non est, alimenta præstanda sint, ob eam quam supra attulimus rationem.

Odys. l. 216.

VIII. 1 Sed et illa regulæ exceptio addenda est, si non satis constet hunc illo esse genitum. Verum est de factis nullam esse certam perceptionem: sed ea, quæ solent in hominum conspectu fieri, sui generis certitudinem habent ex testimonio: quo sensu mater certa esse dicitur, quia inveniuntur qui quæve partui et educationi adfuerint: at de patre hujus gradus certitudo haberi non potest, quod Homerus indicat dicens:

Οὐ γὰρ πᾶς τις ἔδν γόνον αὐτὸς ἀνέγνω.

Generis nemo sibi conscius ipse est.

Et eum sequutus Menander²:

Αὐτὸς γὰρ οὐδέ τις οἷδε πᾶς ἐγείνατο.

Nemo ipse novit quo sit exortus satu.

sic enim ambo unam tantum sortiri debuisse, qualem Josephus pater ipsorum consequuturus erat. Verum adoptionis jus hec valuit, ut Auctor noster

ipse observat in Nota ad § sequ. J. B.

¹ *Exhereditatio, quæ Romanis fuit usitata*] Vide *Baba Kama* cap. ix. § 10. vide infra § xxv.

VII. What we have said of the conjectured will, holds only if there be no evidence to the contrary. Amongst such evidence, the first place belongs to *abdication* of a son, which was practised by the Greeks, as *exheredation* [disinheriting] was by the Romans: but this rejection or disinheriting of a son, if he had not merited death by his crimes, was to be so limited that he was to be provided with aliment, as we have stated above.

VIII. 1 To the rule of a man providing for a son, this exception also is to be added; if it be not sufficiently certain that he is really his son. Things which are done in the sight of men have a certain degree of certainty from testimony; and as persons are usually present at the birth of a child, the mother is known, but the father cannot be known with the same certainty. So Homer, Menander.

Hence it was necessary to find some other way in which it might be known who was the father of a child: and the way is, marriage in its natural state, that is cohabitation, the woman being in the custody of

Qui et alibi [Apud Stob. *Florileg.* tit. 76]:

Ἔστιν δὲ μήτηρ φιλότεκνος μᾶλλον πατὴρ,

Ἥ μὲν γὰρ αὐτῆς οἶδεν υἱὸν, ὃ δ' οἶεται.

Mater tenerius liberos adamat patre:

Quia mater esse scit suos, pater autumat.

Ideo ratio aliqua reperienda fuit, qua probabiliter constaret quis esset partus cujusque pater. Ea ratio est, conjugium sumtum in terminis naturalibus, id est, consociatio, qua femina sub maris custodia constituitur. Sed etsi alio quovis modo constet quis fuerit pater, aut pater id pro explorato habuerit, naturaliter is partus non minus quam alius quivis succedet. Quidni? cum etiam extraneus palam pro filio habitus, quem adoptatum vocant, succedat ex conjectura voluntatis?

2 Naturales vero, etiam post lege introductum eorum discrimen a legitimis,

(Τῶν γησιῶν γὰρ οὐδὲν ὄντες ἐνδεεῖς

Νόμῳ νοσοῦσιν.

Notha parte nulla sobole legitima minor,

Sed lege premitur.

Frag. Andromeda:
[xxvii. ed.
Dindorf.]

Ut dixit Euripides) possunt tamen adoptari, nisi lex obstat.

Atque id olim permittebat lex Romana Anastasii, sed postea in justī matrimonii favorem difficilior quædam ratio eos legi-

L. Juv. 6. C.
d. Nat. Lib.

* Habet ab EUSTATHIO, in Homer.

pag. 1412. Ed. Rom. ubi tamen alio modo et sensu, quem Auctor ipse sequitur in versione sua: Αὐτὸν γὰρ οὐδεὶς

οἶδε τοῦ πατρὸς ἐγένετο &c. J. B.

= Extraneus palam pro filio habitus] Aut nepos in filium adoptatus, ut a Jacobo nepotes Ephraim et Manasses.

the man. But if it be known in any other way who is the father, or the father have ascertained the fact, such offspring, as well as any other, does by Natural Law succeed. Why not? Since a stranger, adopted as a son, also succeeds from the conjectured will.

2 Natural children, even after the law has made a difference between them and legitimate children, [see Euripides,] may be adopted [by the father], except the law interpose. This was formerly permitted by the Roman Law of Anastasius: but afterwards, in order to favour legitimate marriage, a more difficult way of putting them on a footing of equality with legitimate children was introduced, *per curiæ oblationem*, by offering them to be *Curiales* [a burthensome condition], or by subsequent marriage [of the parents]. An example of the old adoption of natural children we have in the sons of Jacob, who were by their father made equal to the sons of free women, and received equal parts in the inheritance.

timis æquandi reperta est, per curiæ oblationem, aut subsequens matrimonium. Exemplum veteris adoptionis naturalium est in Jacobi filiis, qui adæquati a patre sunt liberarum mulierum filiis, et æquis partibus hereditatem creverunt.

3 Contra evenire potest, non ex lege tantum, sed et ex pactione, ^aut qui ex conjugio nati sunt, alimenta sola habeant, aut certe excludantur a præcipua hereditate. Conjugium tali pacto initum etiam cum libera femina concubinatum *Gen. xxv. 6.* Hebræi vocant, quale erat Abrahami cum Cethura, cujus liberi perinde ut Ismaël, ancillæ Agar filius, dona, id est, legata quædam acceperunt; hereditatem autem non creverunt. Tale est matrimonium ad morgengabicam quod dicitur: a quo non longe abeunt secundæ nuptiæ ^oapud Brabantos: nam rerum soli, quæ exstabant cum matrimonio prius solveretur, proprietas acquiritur prioribus liberis.

IX. 1 Ubi desunt liberi, quibus naturaliter deferatur successio, minus expeditum est, nec ulla in parte magis

^a *Ut qui ex conjugio nati sunt, alimenta sola habeant*] Ut olim filii post primum geniti in Mexicanis terris. [Vide Fr. Lopez de Gomara, *Hist. gener. Ind.*

Occid. Lib. II. c. 76].

^o *Apud Brabantos*] Vide legem similem veterum Burgundionum, Lib. I. tit. I. n. 2. [De Brabantia vide Petrum

3 On the other hand, it may happen, not only by law but by compact, that children born in marriage may receive aliment alone, or at least may be excluded from the principal inheritance. A marriage contracted on such a compact, even with a free woman, the Hebrews called concubinage; such was the marriage of Abraham with Keturah, whose children, like Ishmael the son of Hagar, received certain gifts or legacies, but did not succeed to the inheritance of their father. Such is the marriage which is called *morgengabe*: and not very different from this is the law of second marriages among the Brabanters: for the landed property which existed when the former marriage was dissolved passes to the children of the first marriage.

IX. 1 Where there are no children to whom the succession may naturally fall, the case is less clear; nor is there any point in which Laws are more various. The whole variety however may be referred mainly to two sources; one of which respects the proximity of degree, the other directs the property to return to the quarter from which it came; as the phrase is, the father's goods to the father's house, the mother's to the mother's. We find it necessary to make a distinction between the property of the father and grandfather, (as it was expressed in the formula* in which the prodigal was interdicted from the con-

* The formula was this: Quando tua bona paterna avitæque nequitia tua dis-

variant leges. Tota tamen varietas ad duos maxime fontes referri potest, quorum alter respicit proximitatem gradus, alter bona redire vult unde venerant; quod dici solet, paterna paternis, materna maternis. Nobis omnino distinguendum videtur inter ^pbona paterna avitaeque, ut dici solebat in formula qua prodigo bonis interdicebatur, et inter ^qnoviter quasita, ut in illis locum habeat Platonis illud: ἐγὼ οὖν νο- De Leg. xl.
p. 983 A.
μοθέτης ὢν οὐθ' ὑμᾶς ὑμῶν αὐτῶν εἶναι τίθημι, οὔτε τὴν οὐσίαν ταύτην, ξύμπαντος δὲ τοῦ γένους ὑμῶν, τοῦ τε ἔμπροσθεν καὶ τοῦ ἔπειτα ἐσομένου. *Ego legum conditor neque vos vestri juris esse scisco, neque patrimonium vestrum, sed totius vestri generis, tum quod fuit, tum quod futurum est.* Qua de causa Plato κλήρον πατρῶν saluum esse vult generi, unde venit. Quod non ita accipi velim, quasi naturaliter de bonis paternis avitisque testari non liceat (^rsæpe enim indigentia amici alicujus efficit, ut id non laudabile modo sit, sed etiam necessarium) sed ut appareat

Stockman. in libro *De jure Devolutionis* etc. J. B.]

^p Bona paterna avitaeque] Hebræis מורשה.

^q Noviter quasita] Hebræis נכר. Discrimen hoc vide in *lege Burgundica*

Lib. 1. tit. 1. num. 1.

^r Sæpe enim indigentia amici ali-

trol of property,) that is, the old inheritance, and new acquisitions. The former are to be regulated by Plato's rule; who directs the *patrimonial lot* to be kept inviolate for the family to which it belongs. Which we are not so to accept as if it were not lawful to dispose by testament of property received from father or grandfather, (for that is often not only laudable but necessary,) but that it may appear what is to be supposed the will of an intestate person in a doubtful case. For we grant that the person of whom we speak has in him plenary ownership †.

2 But since he cannot retain his ownership after death, and it must be held for certain that he would not lose the means of doing a favour to some one; let us consider what is the most natural order of such favours ‡. Aristotle says that we are to repay obligations before we confer favours; and so Cicero, Ambrose. But obligations may be repaid to the living or to the dead: to the dead, in their children who

pendis, liberosque tuos ad egestatem perducis, ob eam rem tibi ea re commercioque interdeo. Paulus 3. Sent. tit. 4. § 7. *Gronovius.*

† It is plain that Plato's law withholds plenary ownership. W.

‡ The making the owner so completely the master of his property even after his death, that it is to be disposed of by conjecture as to what he would have wished, rather than by any other rule, is an extreme view of ownership. W.

quæ in dubio credenda sit fuisse voluntas intestati. Concedimus enim plenum dominium esse penes eum, de cujus voluntate agimus.

Ætic. Nic.
ix. 2.

De Offic. l. 15.

De Offic. l. 31.

Off. l. 31.

*Cap. 20, et
seqq.*

L. Quod acit.
3. C. de bon.
quæ lib. t.
§ 3. de emanc.
§ 1.
Cum enim. C.
de leg. her.
l. Sanc. il.
C. Com. de
succ. Novel.
84. de cons. et
uter. frat.

2 Sed cum post mortem dominium hoc retinere non possit, et omnino pro certo haberi debeat, noluisse eum perdere beneficii materiam, videndum est quis sit in beneficiis ordo maxime naturalis. Bene Aristoteles: *εὐεργέτη ἀνταποδοτέον χάριν μᾶλλον ἢ ἐταίρῳ δοτέον. Potius est gratiam referri ei qui beneficit, quam amico conferre beneficium.* Et Cicero: *Nullum officium referenda gratia magis necessarium est.* Item: *Cum duo genera liberalitatis sint, unum dandi beneficii, alterum reddendi; demus nec ne, in nostra potestate est; non reddere bono viro non licet: modo id facere possit sine injuria.* Ambrosius: *Pulchrum est propensioem haberi ejus rationem, qui tibi aut beneficium aliquod aut munus contulit.* Et mox: *Quid enim tam contra officium, quam non reddere quod acceperis?* Gratia autem refertur aut viventibus, aut defunctis. Defunctis, ut ostendit Lysias oratione funebri, refertur gratia in eorum liberis, qui naturaliter pars sunt parentum, et quibus, si viverent parentes, maxime vellent benefieri.

3 Et hanc æquitatem sequuti sunt Justiniani juris conditores, æquitatis studiosissimi, in quæstione inter fratres plenos, et consanguineos, et uterinos, et aliis quibusdam.

cujus efficit, ut id non laudabile modo sit] Seneca de Beneficiis libro IV. c. 11. *Quid cum ipso vita in fine constitimus, cum testamentum ordinamus, non beneficia nobis nihil profutura dividimus? quantum temporis consumitur, quamdiu secreto agitur, quantum, et quibus demus? quid enim interest quibus demus a nullo recepturi? Atqui nunquam diligentius damus, nunquam magis judicia*

nostra torquemus, quam ubi, remotis utilitatibus, solum ante oculos honestum stetit?

* *Aut defunctis*] Sic moriturus apud Procopium Pers. I. τὰ παῖδια ἀφελῶν, ἀφελήσεις ἐμέ. *In me conferes quidquid in liberos meos contuleris.* (Cap. 4.) Vide exemplum in facto Theodosii, patrem Valentiniani junioris in ipso Valentiniano remunerantis, apud Zosimum

are a part of them; and whom if they were alive they would wish to have benefited. See Lysias.

3 And this equity has been recognized by the careful framers of Justinian's code, in the question between full brothers, and brothers by the father's side, and by the mother's; and in some other cases. See Aristotle: Valerius Maximus. In Justin it is called *gentium commune jus* for brother to succeed to brother.

4 When he is not to be found from whom the property came, nor

Aristoteles: ἀδελφοὶ ἀλλήλους φιλοῦσιν τῷ ἐκ τῶν αὐτῶν Eth. Nicom. viii. 14.
 πεφυκέναι· ἡ γὰρ πρὸς ἐκεῖνα ταυτότης ἀλλήλοις ταυτό
 ποιεῖ· *Fratres se invicem diligunt quatenus ex iisdem nati*
sunt; nam ortus communis ipsos quasi eosdem facit. Va- Lib. v. 5.
 lerius Maximus: *Ut merito primum amoris vinculum duci-*
tur, plurima et maxima beneficia accepisse, ita proximum
judicari debet simul accepisse. Gentium commune jus, ut
 frater fratri succedat, dicitur apud Justinum. Lib. x.

4 Quod si non reperiat is, a quo proxime bona vene-
 runt, ejusve liberi, restat ut gratia referatur his, quibus minus
 quidem, sed tamen post illum proxime debetur, id est parenti
 superioris gradus, ejusque liberis, præsertim cum eo modo
 maneatur intra proximos, et ejus, de cujus hereditate agitur,
 et ejus, a quo proxime bona venerunt. Idem ille Aristoteles:
 ἀνεψιοὶ δὲ καὶ οἱ λοιποὶ συγγενεῖς ἐκ τούτων συνωκείων- Ethic. Nic. viii. 14.
 ται· τῷ γὰρ ἀπὸ τῶν αὐτῶν εἶναι γίγνονται οἱ μὲν
 οἰκειότεροι, οἱ δὲ ἀλλοτριώτεροι· *Patrueles vero et ceteri*
cognati conjunguntur per parentes, quatenus ex iisdem
ortum habent: ita ut alii conjunctiores sint, alii minus
conjuncti, pro ortus ratione.

X. 1 At in bonis noviter quæsitis, quæ περίοντα τοῦ De Legg. xi. p. 923 D.
 κλήρου Platoni, cum cesset gratiæ referendæ officium; super-
 est, ut ei deferatur successio, qui defuncto carissimus fuisse
 creditur. 'Is autem est qui gradu cognationis proxime de-

libro iv. Lege Mosis succedebat post
 fratres patruus, ut primo possessori
 propior quam fratrum filii. Num. xxvi.
 10. [Imp. Gratianus, cui debebat im-
 perium Theodosius, non erat pater Va-
 lentiniani junioris, sed frater, ut notum.
 Deinde Theodosius nequaquam ex ani-
 mo grato erga defunctum arma cepit
 pro Valentiniano, sed amore Gallæ,
 hujus sororia. Vide capp. 43. et 44.

Libri iv. Zosimi, heic indicati. J. B.]
 'Is autem est, qui gradu cognatio-
 nis proxime defunctum attingit] Vide
 Deuter. xv. 11; xxiii. 7; Prov. xi. 17.
 Tractat hoc Servius ad illud *Æneidos*
 vi. (vers. 611):

Nec partem ponere suam —

Hierocles: ἡ δὲ τῶν ἀγχιόττων (τιμῇ)
 πρὸς τὴν τῆς φύσεως ἐγγύτητα παρα-
 μετρήσει τὴν θεραπείαν, τοσοῦτον τῆς

his children, it remains that the obligation be repaid to those to whom
 it is due in the next degree, though less due; that is, to a parent of
 superior degree and his children; especially since by that means it
 remains among the nearest relatives, both of the deceased owner, and
 of the person from whom the property came. So Aristotle.

X. 1 In newly acquired property, (the surplus beyond the patri-
 monial lot, of Plato) when the rule of repaying obligations fails, it
 remains that the succession fall to him who is believed to have been

Orat. iii. pp.
413, 417.

Offic. i. 16.

Vit. Agric.
31.
Offic. i. 17.

De Fin. iii. 30.

De Offic. i. 14.

Offic. i. 30.

Decl. 308.

functum attingit. Sic Isæus apud Græcos receptum ait, τοῖς ἐγγυτάτω γένους τὰ τοῦ τελευτήσαντος γεννήσεσθαι, *defuncti bona ei cedere qui genere sit proximus*: addit: τί ἂν, τί δικαιότερον, ἢ τοῖς συγγενέσι τὰ τοῦ συγγενούς; *quid justius quam ut quæ cognati fuerant cognatis cedant?* Idem sensus est apud Aristotelem libri ad Alexandrum capite ii. *Optime, inquit Cicero, societas hominum conjunctioque servabitur, si, ut quisque erit conjunctissimus, ita in eum benignitatis plurimum conferatur.* "Qui et alibi post liberos ponit bene convenientes propinquos, ut et Tacitus: *Liberos cuique ac propinquos suos natura carissimos esse voluit.* Idem Cicero alibi de cognatis agens: *Necessaria præsidia vitæ debentur his maxime.* Debentur scilicet non ex jure expletorio, sed κατ' ἀξίαν. Et alibi, cum de affectione erga propinquos egisset, *Ex hac animorum affectione, subdit, testamenta commendationesque morientium natæ sunt.* Idem copias nostras proximis quam alienis et suppeditari et relinqui æquius esse ait. Ambrosius quoque: *Est etiam illa probanda liberalitas, ut proximos seminis tui non despicias.*

2 Successio autem ab intestato, de qua agimus, nihil aliud est quam tacitum testamentum ex voluntatis conjectura. Quintilianus pater in declamatione: *Proximum locum a tes-*

μετὰ γούρας τιμῆς ἐκάστῃ τῶν συγγενῶν νέμουςα, ὅσον ἂν ἢ πρὸς ἐκείνους ἐγγύτης ὑποφάινῃ. Cura autem propinquorum mensuram suam accipiet a propinquitate naturali, ut post parentes tantum cognatorum cuique deferatur, quantum ad parentes propinquitatis exigit. [In Aurea Carm. Pythag. vers. 4. pag. 48, 49. Ed. Needham] Possidius de

Augustino: *Justum et æquum esse videbat, ut a mortuorum vel filiiis, vel parentibus, vel affinibus magis possiderentur, hereditates scilicet, de quibus ibi agit.* (Cap. 24. Vit. Aug.)

"Qui et alibi] Duo hæc loca ex Cicerone posterius producta, sunt ex eodem libro officiorum primo. (c. 17).

" Ut proximos seminis tui non despi-

most dear to the deceased: and this is he who comes nearest to the deceased in the degree of relationship. So Isæus, Aristotle, Cicero, Tacitus, Ambrose. [This however is a moral claim, not a jural claim.]

2 The succession to intestate property, of which we here speak, is nothing but a tacit testament made out by conjecture of the late owner's will. So Quintilian. And what we have said of property newly acquired, will hold also of inherited property, if neither the persons from whom it came nor their children are extant.

XI. 1 The rules which we have given, though most consentaneous to natural conjecture, are, however, not necessary by Natural Law; and therefore by different causes, moving the human will, they vary by compacts, laws, customs. These in some cases allow one person to

tamentis habent propinqui: et ita, si intestatus quis ac sine liberis decesserit. Non quoniam utique justum sit, ad hos pervenire bona defunctorum: sed quoniam relicta et velut in medio posita nulli propius videntur contingere. Quod de bonis noviter quæsitis diximus, ea naturaliter proximis deferri, idem locum habebit in bonis paternis avitisque, si nec ipsi a quibus venerunt, nec eorum liberi exstent, ita ut gratiæ relatio locum non inveniatur.

XI. 1 Hæc vero quæ diximus quamquam naturali conjecturæ maxime sunt consentanea, non sunt tamen jure naturæ necessaria; ac proinde ex diversis causis voluntatem humanam moventibus, variari solent, pactis, legibus, moribus: qui subitionem in locum in nonnullis gradibus admittunt, in aliis non admittunt; alibi distinguunt, unde bona veniant, alibi id insuper habent. Est ubi primogeniti plus postgenitis ferunt, ut apud Hebræos: est ubi inter se sequantur. Est ubi agnatorum habetur ratio; est ubi cognati quilibet cum agnatis tantundem ferunt. Etiam sexus alicubi momentum habet, alicubi non habet: et alibi cognationis ratio habetur intra propiores gradus: alibi longius extenditur: quæ longum esset exsequi, nec instituti nostri.

2 Illud tamen tenendum est, quoties voluntatis expres-

ciæ] Ex *Essa* sumtum lviil. 7. Paria habes apud Chrysostomum 1 Cor. iv. 7. et apud Augustinum de *Doctrina Christiana* Lib. xi. xii.

1 *In aliis non admittunt*] Veteres Germanorum mores subitionem istam sive representationem ignorarunt etiam inter liberos: introduxit primus id jus in Franciam Childebertus edicto: in

Trans-Rhenanas partes Otho, Henrici filius: teste Withekindo Lib. ii. vide *legem Langobardicam* Lib. ii. tit. xiv. 18. Scoticum quoque jus vetus solam spectabat gradus proximitatem. Vide Pontanum *Davicorum* septimo, ubi narrat a rege Angliæ arbitro sumto ita pronuntiatum. (Pag. 378).

succeed in the place of another; in other cases, do not permit it; in others, make a distinction as to whom the property came from; in others, disregard this. In some cases the first-born take more than those born later, as among the Hebrews; in others, the shares are equal. In some cases the father's relatives only are reckoned; in others, the mother's relatives share equally with the father's. Sometimes the sex has its effect, sometimes it has not; sometimes account is had of cognation within the nearer degrees, in other cases it is extended further. It would be tedious and foreign to our purpose to follow these differences.

2 This rule we must hold by: that when there are no more express indications of will, it must be supposed that every one intended,

siora indicia nulla sunt, credi quemque id de sua successione statuisse quod lex aut mos habet populi, non tantum ex vi imperii, sed ex conjectura, quæ etiam in eos valet, quorum in manu est summum imperium. Nam et hi probabiliter creduntur in rebus suis æquissimum judicasse, quod aut legibus sauxerunt ipsi, aut moribus probant; in iis dico rebus, in quibus de nullo ipsorum damno agitur.

XII. Sed in regnorum successione distinguì debent regna, quæ pleno modo possidentur, et in patrimonio sunt, ab his quæ modum habendi accipiunt ex populi consensu: quo de discrimine egimus supra. Prioris generis regna ^adividi possunt etiam inter mares ^aet feminas, ut in Ægypto et Britannia olim factum videmus:

^a *Dividi possunt etiam inter mares*] In Asia fratres simul regnabant, sic et uni præcipuum esset jus diademat. Polybius Exc. legationum xciii. Invenies et apud Livium (xliv. 19; xlv. 11) eundemque Polybium, (*Excerpt. leg.* 89) Ægyptum inter fratres Ptolemæos divisam. Filii Attilæ gentes sibi dividi æqua sorte posebant: Jornandes de *Rebus Gothicis*. (cap. 50). Gregoras Lib. vii. de Irene Andronici Palæologi uxore: τὸ δὲ καινότερον, ὅτι οὐ μοναρχίας τρόπον κατὰ τὴν ἐπικρατήσανσαν Ῥωμαίοις ἀρχήν ἐν συνήθειαν, ἀλλὰ τρόπον λατινικόν, διανεμαμένους τὰς Ῥωμαίων πόλεις καὶ χώρας, ἀρχεῖν κατὰ μέρος τῶν υἱῶν ἕκαστον, εἰς οἰκεῖον κλήρον καὶ κτήματος τοῦ λαχόντος, ἐκ πατρῶν μὲν ἐς αὐτοὺς κατὰ τὸν ἐπικρατήσαντα νόμον ταῖς περιουσίαις καὶ κτήσεσι τῶν βαναύσων ἀνθρώπων κατιόντος, παραπεμπομένου δ' ἐπειθ' ὁμοίως εἰς τοὺς ἐφεξῆς παῖ-

δες καὶ διαδόχους. λατίνων γὰρ οὐσα γέννημα καὶ παρὰ τούτων εἰληφνία τοῦτ' ἰδὲ νεώτερον ἶδος, ἐπ' αὐτοῖς ἐβούλετο. *Quod maxime mirandum erat, voluit ut non unus imperaret, secundum morem Imperii Constantinopolitani veterem, sed adinstar principum in Occidentis civitates et regiones dividerentur in singulos filiorum, ut sic regnum tanquam proprium cuiusque patrimonium a patribus ad ipsos perveniret, ita ut in plebeiurum hominum bonis fieri solet, ac sic perpetuo ad cuiusque liberos heredesque descenderet. Ipsa enim cum ex occidentis partibus ortum haberet, morem, quem ab ipsis acceperat, huc sine exemplo introducere animo agitabat.* (Pag. 106. Edit. Genev.)

^a *Et feminas, ut in Ægypto et Britannia*] De Alexandro et Laodice vide Polybium excerptis legationum cxli. de Auletæ filia Strabonem xvii, (pag. 796.) In Asia post Semiramidem femi-

with respect to his own succession, that which the law or custom of the people directs: and this, not only from the force of the authority of the State, but from conjecture of what the person's will was. And this is to be held good also of the persons who have the sovereign authority. For they are probably believed to have judged in their own case that which is most equitable, which is what they have established as law or sanctioned as custom.

XII. In the Succession to kingdoms, we must distinguish the kingdoms which are held by plenary possession and which are patrimonial, from those which are held in some way involving the consent of the

Nulla discrimine sexus

Reginam scit ferre Pharos.

Ait Lucanus: de Britannis Tacitus, *Neque enim sexum in imperio discernunt*. Nec adoptati minus veris liberis succedent ex præsumpta voluntate; sic Æpalio Locrorum regi Hyllus Herculis filius per adoptionem in regnum successit. ^a Molossus ^b nothus ex patris Pyrrhi, legitimos liberos non habentis, iudicio successit in regnum Epiri: de adoptando in successionem Scythiæ Philippo egit rex Atheas: Jugurtha nothus, sed adoptatus, successit in regno Numidico: sicut et in regnis quæ Gothi, et Langobardi armis quæsierant, adoptionem valuisse legimus. Imo etiam ad eos proximos ultimi possessoris regnum perveniet, qui primum regem sanguine non attingunt, si

Phars. x. 91.
Vit. Agric. 16.

Strabo ix. p. 497.

Paus. i.

Just. ix. 2.

Sall. Bell. Jug. c. 10, 11, 25.

Cass. Chron. Paul. Diac. Lib. vi. de Gest. Lang.

nas regnasse plures narrat Arrianus *δυαβδον*. (Lib. i. c. 24.) Talls Nitocris Babylone, Artemisia Halicarnassi, Tomyris apud Scythas. Servius ad primum *Æneidos* (vers. 654): *Quia ante etiam femina regnabant*. Idem apud Rutulos obtinuisse docet ad ix. *Æneidos* (vers. 654). [De Feminarum successione in regnum, ut putatur, apud Assyrios, vide Conrad. Samuel Schurzleisch. Disp. LVIII. pag. 28, et seqq. J. B.]

^a In ora libri Auctor hæc testem indicat Pausaniam, Lib. i. Locus est cap. xi. Sed non satis accurate, quæ in eo legerat, retulit. Nam I. Molossus non erat filius nothus Pyrrhi, sed major natu trium liberorum susceptorum ex Andromache, quam pro legitima uxore habuerat, ut ait Servius in *Æn.* iii. 297. II. Non dicit Pausanias, Molossum, deficientibus liberis legitimis, a Pyrrho heredem regni institutum: sed Helenum, filium Priami, post mortem

Pyrrhi, uxore ducta Andromache, Pyrrho in regnum successisse, quod moriens ipse Molosso reliquit. J. B.

^b *Nothus*] Apud Tartaros nothi et legitimi pares. De Persis vero Herodotus: *νόθον οὐ σφί νομός ἐστι βασιλεύειν, γνησίου παριέοντος*. *Mos non est illis ut nothus regnet dum legitimus aliquis reperitur*. (Lib. iii. c. 2). In Hispania Wandali regnarunt duo, Gontharis legitimus, Gizerichus nothus Godigiselci teste Procopio (*Vandalic.* i. 3) ex Septentrionalium nimirum gentium more veteri, cujus testes Adamus Bremensis *Historia Ecclesiastica* c. 106. Helmoldus *Slavicus* Lib. i. c. 51 et 52. Michaeli Thessaliæ domino successit legitimis deficientibus nothus Michael. Gregoras Lib. ii. (pag. 22.) Huic item nothus successit ex parte: idem Gregoras Lib. iv. (Pag. 52. *Ed. Genev.* 1616). De Molosso Pyrrhi notho vide Servium ad iii. *Æneidos*. (vers. 297).

people. Of which difference we have spoken above.

Kingdoms of the former kind may be held by males or females: as formerly in Egypt and in Britain. See Lucan and Tacitus. And adopted as well as real children succeed in such cases, from presumption of the will. So Hyllus the adopted son of Hercules succeeded Æpalius; Molossus succeeded Pyrrhus; Atheas [Ateas, Gronov.] would have taken Philip for his successor; Jugurtha succeeded to the kingdom of Numidia; and so in the kingdoms of the Goths and Lombards adoption prevailed. Even the kingdom shall pass to those relatives of the last possessor who have no connexion by blood with

talis successio in iis locis recepta sit: sicut Paphlagoniam regum domesticorum interitu hæreditariam patri suo obvenisse ait, apud Justinum, Mithridates.

Lib. xxxviii.
6.

XIII. Quod si dictum sit ne dividatur regnum, nec cui cedere debeat expressum sit, ^cut quisque natu est maximus, mas aut femina, regnum habebit. In Thalmudico titulo de regibus legitur: *Qui præcipuum jus habet in hæreditate, is et in possessione regni. Ideo filius natu major præfertur minori.* Νομιζόμενον πρὸς πάντων ἀνθρώπων τὸν πρεσβύτατον τὴν ἀρχὴν ἔχει, inquit Herodotus: *Mos omnium populorum est, ut natu maximus imperium habeat.* Idem alibi sæpe νόμον legem sive consuetudinem regnorum hoc vocat.

Lib. vii. 2.

Livius duorum fratrum Allobrogum de regno contententium minorem ait jure minus, vi plus potuisse. Apud Trogum Pompeium, *Artabaxanes maximus natu ætatis privilegio regnum sibi vindicabat: quod jus et ordo nascendi, et natura ipsa gentibus dedit.* Idem alibi jus gentium vocat: ut et Livius,

Lib. xxi. 31.

Just. ii. 10. *Pompeium, Artabaxanes maximus natu ætatis privilegio regnum sibi vindicabat: quod jus et ordo nascendi, et natura ipsa gentibus dedit.* Idem alibi jus gentium vocat: ut et Livius,

Just. ii. 10.

Lib. xi. 11. qui et ordinem appellat ætatis atque naturæ, quod intellige nisi

Lib. xi. 11.

^c *Ut quisque natu est maximus*] De Suedis vide Brigittam iv. 3. De Danis Saxonem xii. et xiii. Appianus Mithridatico: δικαιούντα τὸν πρεσβύτερον ἀρχεῖν: (pag. 178.) *Æquum judicabat regnum esse natu maximi.* Niceas Choniates Joanne Comneno: ἡ φύσις τοῖς πρωτοτόκοις παισὶ τῇ τάξει ἐμμένουσα τὰ πρωτεῖα βραβεύειν εἰωθε. παρὰ δὲ Θεῷ οὐχ οὕτως ἐν ταῖς τῶν προβλήσεων μεγίσταις δέῃ πως φιλεῖ γενέσθαι: *Natura quidem suum sequens ordinem primum natos honorat. At Deus non semper in maximis privilegiis eum ordinem insistit.* (Cap. 12). Idem Ma-

nuele de Isaacio loquens: ἀπὸ γενέσεως εἰς τὴν διαδοχὴν τῆς βασιλείας καλοῦμενος: *Nascendi ordine ad regni successionem vocatus.* (Lib. i. c. 1). Apud Josephum Antipater dicebat, Hyrcani ἀρχὴν εἶναι διὰ τὸ πρεσβεῖον: *Principatum esse ob nascendi ordinem.* (Bell. Jud. Lib. i. cap. vi. § 2. Edit. Hudson.) vide et Leunclavium *Turcicorum* xvi.

¹ Confer, de tota ista materia successionis in regna, PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. vii. cap. 7. § 11. et seqq. J. B.

^d *Ni aliud lex aut mos ferat*] Dardanus et Jasius pariter in Troja regnabant

the first king (the source of the royal stock), if such succession be received in the country in question. Thus Mithridates, in Justin, says that his father received Paphlagonia by inheritance, the line of domestic kings being extinguished.

XIII. If it be directed that the kingdom is to pass undivided, but not to whom it is to go, the eldest child, male or female, will take it. See the Talmud on kings, Herodotus, Livy, Trogus Pompeius. This is called *jus gentium*, the order of age and of nature. But he or she who succeeds in such a kingdom is bound to provide a satisfaction for the coheirs, instead of their share of the power, if, as and as far as, it can be done.

pater aliud jussit, ut Ptolemæus apud eundem Trogum. Qui Lib. xvi. 2. autem in regno tali succedit, coheredibus tenebitur pro ipsorum partibus æstimationem rependere, si et quatenus id fieri potest¹.

XIV. At ea regna, quæ populi libero consensu facta sunt hereditaria, ex præsumpta populi voluntate deferuntur. Præsumitur autem populus id voluisse quod maxime expedit. Hinc primum illud nascitur, ut ¹ni aliud lex aut mos ferat (sicut Thebis Bœotii regnum fuisse inter mares dividuum ex ²Zethi et Amphionis, itemque ex Œdipodis filiorum historia apparet, et vetus ³Attica inter Pandionis liberos divisa est; et quæ ⁴circa Rhodum inter Camirum, Jalysum, Lindum fratres; et regnum Argivum inter quatuor Persei filios) individuum sit regnum, quia id ad tuendum regnum et civium concordiam plurimum valet. Justinus libro xxi. *Firmissimum futurum esse* Cap. i. n. 2. *regnum, si penes unum remansisset, quam si portionibus inter plures filios divideretur, arbitrabantur.*

XV. Alterum, ut successio stet intra eos qui descendunt a primo rege: ea enim familia ob nobilitatem electa censetur,

Servius ad illud *Æneidos* (iii. 15): *Sociique penates*. In Creta Minos et Rhadamanthus. Julianus contra *Christianos*. (Pag. 180 D. Ed. Spanh.) Albæ Numitor et Amulius, ut quidam ait scriptor de Viris illustribus. (c. 1.) Alii enim Numitori pecunias, regnum Amulio cessasse aiunt, ut Pinitarchus: (in Rom. p. 19 A.) sicut et Eteocli regnum Thebanum, Polynici ejus loco monile Hermiones obvenisse quidam prodidere. [Vid. Scholiasten Euripidis, in *Phæniss.* vers. 71.] Pari modo in Norvagia alteri regnum, alteri naves et spes ex maritimis

expeditionibus.

¹ Zethi et Amphionis] Euripides *Hercule Furiente* (vers. 29):

Τῷ λευκοπαλῷ πρὶν τυραννίσσαι χθονὸς
'Αμφίων' φῶλ Ζῆθον, ἀγρόν τε Διός.

Regnum priusquam venit ad claros equis
Amphionem Zethumque, prognatos Jove.

² Divisio veteris Regni Athenarum spectabat agros, non autem imperium, quod uni manebat, ut Auctor ipse supra observavit, in Nota ad Cap. iii. hujus libri, § 4. J. B.

³ Refert id PINDARUS, *Olympion.* VII. 135, et seqq. J. B.

XIV. Those kingdoms which have become hereditary by the free consent of the people, are transferred according to the presumed will of the people. The people are presumed to will what is most expedient. Hence it follows, in the first place, that the kingdom passes undivided, because that arrangement is of great use to preserve the state and the concord of the citizens. So Justin: except law or custom ordain otherwise, as at Thebes, the kingdom was divided between the males; and ancient Attica among the sons of Pandion; and Rhodes; and Argos. [See.]

XV. Another rule is, that the succession remains among those who are descended from the first king: for that family is conceived to be

Cap. vii. n. 15. *eaque finita regnum redire ad populum. Curtius libro x. In eadem domo familiaque imperii vires remansuras esse: hereditarium imperium stirpem regiam vindicaturam: assuetos esse ipsum nomen colere, venerarique: nec quinquam id capere nisi genitum ut regnaret.*

XVI. Tertio, ne succedant nisi qui nati sunt secundum patriæ leges: non naturales tantum, quia ad contemptum patent, quorum matrem pater justo conjugio dignatus non est, et præterea quia minus certi habentur: at in regnis expedit populo haberi maximam certitudinem, quæ haberi potest ad vitandas controversias: quæ causa fuit cur Macedones Demetrio minori Liv. xxxix. 53. potius quam Perseo majori regnum deberi existimaverint, quod Demetrius justa matrefamilias natus esset. Et apud Ovidium legimus:

At ne nupta quidem, tēdaque accepta jugali:

Cur, nisi ne caperes regna paterna nothus?

Sed nec adoptivi, quia nobilitas generis vere regii magis reverendos efficit reges, majorque de eis spes concipitur:

Hor. Od. iv.
4.

Est in juvenis, est in equis patrum
Virtus.

XVII. Quartum, ut inter eos, qui pariter in hereditatem admitterentur, sive quia unius sunt gradus, sive quia in paren-

[*Præferantur mares feminis*] Vide
Nicetam Choniadem Manuèle, libro iv.
(Cap. 4.)

[*Præferatur natu maximus*] Ho-
merus de regno Cretensi *Iliad.* N.

Ἡμῶν δ' ἀμφοτέρουσι δὴν γένος, ἥδ' ἰα πᾶ-
τρη,

Ἄλλὰ Ζεὺς πρότερος γένους καὶ πλεονα ἦδ' η.

Nostrum utrique solum patrum fuit et genus
unum,
Juppiter at senior rerumque paritor idem.

(Vers. 354). Ubi sapienter Homerus,
ut solet, causam reddidit, cur majores
natu in regnis prælati, valentem ἐπὶ τῷ
πολλῷ, ut plerumque, id enim in talibus
sufficit: τοῦ νόμου τῷ πρεσβυτέρῳ

elected for its nobility, and when it fails, the kingdom to return to the people. So Curtius. [See.]

XVI. In the third place, that none succeed except those who are born according to the laws of the country: not natural children, who are open to contempt, since their father did not deem their mother worthy of a legitimate marriage, and besides, as being less certain. For in kingdoms it is expedient for the people that there should be the greatest possible certainty, to avoid controversies. So Demetrius in Macedon was taken, rather than Perseus. So says Ovid. Also not adoptive children, because the nobility of the race makes kings more revered, and turns more hope to them. So Horace. [See.]

XVII. In the fourth place, that among those who are admitted

tum suorum gradum succedunt, 'præferantur mares feminis : ideo quod mares tum ad bella, tum ad alias imperii partes magis idonei feminis censentur.

XVIII. 1 Quintum, ut inter mares, aut inter feminas ubi mares deficiunt, 'præferatur natu maximus; quod is iudicio aut perfectior jam esse, aut prius futurus creditur. Cyrus apud Xenophontem: τὸ προηγείσθαι προστάττω τῷ προτέρῳ γενομένῳ, καὶ πλείονων κατὰ τὸ εἶκος ἐμπεῖρῳ ^{Cyrop. viii. 7. § 3.} imperium relinquo majori natu, ut quem par est rerum esse peritiorum. Quia vero hæc ætatis præstantia temporaria est duntaxat, sexus autem perpetua, ideo sexus prærogativa potior est quam ætatis. Sic Herodotus, cum dixisset Andromedæ ^{Lib. vii. 61.} filium Persam Cepheo in regnum successisse, causam reddit: ἐτύγχανε γὰρ ἅπαις ἐὼν ὁ Κηφεὺς ἑρσενος γόνου· nullos enim Cepheus habebat liberos mares. Et Diodoro narrante, ^{Lib. iv. 33. p. 167.} Teuthras Mysiæ regnum filiæ Argiopæ reliquit ἅπαις ὦν ἀρρένων non habens mares liberos. Sic Trogus dixit ad filiam ^{Just. i. 4.} pertinuisse Medorum imperium; quod nullum Astyagi virilis sexus genus erat. Similiter Cyaxares apud Xenophontem Mediam filiæ suæ deberi: οὐδὲ γὰρ ἔστι μοι, inquit, ἀρρῆν ^{Cyrop. viii. 5. § 3.} παῖς γνήσιος, neque enim est mihi legitimus filius mas. De Latino rege Virgilius (*Æn.* vii. 50. *et seqq.*):

Filius huic fato divum prolesque virilis
Nulla fuit, primaque oriens erepta juventa est:
Sola domum et tantas servabat filia sedes.

τῶν βασιλέων παίδων διδόντος τὴν τῶν δλων ἡγεμονίαν, alt Zosimus libro ii. (Cap. 27. *Ed. Cellar.*) de Persarum lege: cum les daret e regum filiis natu maximo summam rerum. Periander in

regnum Corinthiorum patri successit κατὰ πρεσβείον, ordine nascendi. Ita Nicolaus Damascenus in excerptis, quæ beneficio viri maximi Nicolai Petrescii habemus. (Pag. 450.)

alike into the inheritance, whether as being of the same degree, or as succeeding in the place of their parents, males are preferred to females; because males are more fitted both for war and for other parts of government.

XVIII. 1 Fifthly, that among males, and among females when the males fail, the elder is preferred, because he is either more mature in judgment, or will sooner be so. So Cyrus in Xenophon. But because this superiority of age is only temporary, while that of sex is perpetual, the prerogative of sex is stronger than that of age. So Herodotus, Diodorus, Trogus, Xenophon, Virgil. So at Lacedæmon, Sparte the daughter of Eurotas succeeded, and her children; and the children of Helen, to Tyndareus, because there were no male children. And

Paus. III. 1.

Lib. I. 9.

Sic ante Heraclidarum imperium apud Lacones Eurotæ successit Sparte filia, aut ejus liberi, ut Tyndareo Helenæ liberi, quia mares filii non extabant; et Eurystheo in Mycenarum imperium successit Atreus ejus avunculus, notante Thucydide. Eodem jure regnum Athenarum ^had Creusam, Thebanum ^aad Antigonem pervenisse notatur, quod mares deficerent. Et regnum Argolicum ad Argum Phoronei ⁱex filia nepotem.

2 Unde et illud intelligere datur, quanquam liberi nonnullis gradibus parentum præmortuorum vicem impleant, id tamen duntaxat intelligendum, ut capaces sint juxta ceteros, salva tamen sexus primum, deinde ætatis prærogativa inter capaces. Nam qualitas et sexus, et ætatis, quatenus in hac re a populo consideratur, ita personæ adhæret ut avelli inde nequeat.

XIX. Quæritur an regnum, ubi hunc in modum deferitur, pars sit hereditatis. Et verius est esse ^hhereditatem quandam, sed separatam ab aliorum bonorum hereditate, qualis hereditas peculiaris in feudis quibusdam, emphyteusi, jure patronatus, et

^b *Ad Creusam*] Vide Euripidem *Ione* (vers. 72, 73, 578).

^a Vide EURIPIDEM, *Phœniss.* vers. 1580, et seqq. 584, et seqq. J. B.

ⁱ *Ex filia nepotem*] Et si sine stirpe

mortuus fuisset Orestes, in eodem regno Argolico successisset ei Electra, ut ex Euripidis *Taurica Iphigenia* (vers. 681, 695, et seqq.) discimus. Sic Calydonis regnum pervenit ad Andræmona Oenei

Eurystheus was succeeded by his uncle Atreus. By the same right the kingdom of Athens passed to Creusa, that of Thebes to Antigone, because the males failed: and the kingdom of Argos went to Argus the grandson of Phoroneus through his daughter.

2 Whence it is to be understood that although children in some degrees fill the place of parents who have died, that is to be understood, so as that they are capable of ruling compared with others, and saving the prerogative, first of sex, and then of age. For the quality of sex and of age, so far as in this matter they are considered by the people, adheres to the person, so that it cannot be separated from it.

XIX. It is made a question whether a kingdom, when thus transferred, is a part of the inheritance. And the more true opinion is that it is a certain kind of inheritance, but distinct from the inheritance of other property; such an inheritance as is seen in some fiefs, in leases, in the right of patronage, in priority of legacy. Whence it follows that the kingdom pertains to him who may take the property as heir if he choose to do so; but in such a way that it may be taken without the property and its burthens. The reason is, because the people is

jure præcipui quod dicitur, conspicitur. Unde sequitur, ut regnum ad eum pertineat, qui et bonorum heres esse possit si velit, sed ita ut etiam sine bonis et eorum onere possit adiri. Ratio est, quia populus regnum voluisse creditur quam optimo jure deferri; nec quicquam ejus refert hereditas a rege adeatur necne, cum hereditarium ordinem non ob hoc elegerit, sed ut certi quid esset, et reverentia conciliaretur ex sanguine: simulque ex genere et educatione spes esset præclaræ virtutis, et regni possessor regnum magis curaret animosiusque defenderet, si id ipsum iis esset relicturus, quos ipse ob acceptum beneficium aut ob caritatem maximi faceret.

XX. Ubi vero mos succedendi diversus est in allodiis et feudis, si regnum non sit feudale, aut certe primitus non fuerit, etiamsi postea hominum pro eo præstetur, succeditur ex lege, qua in allodiis succedebatur tempore regni instituti.

XXI. In iis autem regnis, quæ primitus data sunt in feudum ab eo, qui plene dominus erat, sequenda erit lex successionis feudalis; non semper Langobardica illa quam per-

generum, [Apollodor. l. 8. 6]. Asterii regnum ad generum Minoa, ut refert Apollodorus (III. 1. 3), addita causa quod liberi mares nulli essent.

^k *Hereditatem quandam*] Putavit

Innocentius III. talis regni successionem amitti ab eo qui ultima defuncti mandata non impleverit, c. licet. 6. de voto. [*Decretal.* III. 33. Sed male. Vide quæ diximus in Notis Gallicis.]

supposed to wish that the kingdom should be transferred by the best right possible; nor is it their concern, whether the king accept the inheritance of the property or not; since they chose the hereditary order of succession, not that the heir of the ordinary property should have it, but that the order might be certain, and might carry with it the reverence given to the blood; and also that from the habits of the race and their education, there might be the hope of good moral qualities: and that the possessor of the kingdom might bestow more care on the kingdom, and defend it with more energy, since he was to leave it to those whom he most wished to benefit for benefits received, or from natural affection.

XX. But when the rule of succession is different in *allodial* and in *feudal* property, if the kingdom be not a *fief*, or certainly was not so at first, even though *homage* have been done for it; the succession is by the law which regulated allodial property when the kingdom was instituted.

XXI. But in those kingdoms which were given as *fiefs* by a person who had plenary ownership, the law of feudal succession is to be followed: not however always the Lombardic law which we have in

scriptam habemus, sed quæ in gente quaque recepta fuit, quo tempore data est prima vestitura. Nam Gothi, Vandali, Hunni, Franci, Burgundiones, Angli, Saxones, nationes omnes Germanicæ, qui partes optimas imperii Romani bello occuparunt, suas singuli leges aut mores de feudis, non minus quam Langobardi, habuerunt.

Cognatica.

§ Sub Cond. 4.
Inst. de V. O.

XXII. 1 Frequens autem in regnis est alia quædam successio, non hereditaria, sed quæ ¹linealis dicitur; in qua observari solet non jus illud subitionis in locum quæ repræsentatio dicitur, sed jus transmittendi futuram successionem, quasi delatam, lege scilicet ex spe, quæ nihil ex se et naturaliter operatur, jus quoddam verum excitante: quale scilicet jus est ^min his, quæ ex stipulatione conditionata debentur: ita ut hoc ipsum jus in posteros, ex primo rege venientes, necessario transeat, sed ordine certo, ut primum vocentur liberi ultimi possessoris primi gradus, tam qui vivunt, quam qui mortui sunt: tum vero inter vivos et mortuos ratio habeatur sexus

¹ *Linealis*] Vide Cardinalem Tuschum *Pract. Concl.* 88: verbo *regni successio*: Guilielmum de Montisferrato de successionibus regum, qui liber est in Oceano Juris. Peregrinum *De Jure Fisci*, Lib. i. tit. 11. n. 48. et Lib. v. tit. 1. n. 109. Vide exempla talis successionis in Norvagio regno apud eruditissimum summæque diligentis virum Johannem Pontanum *Historia Danica* libro ix. (Pag. 514, 515) consuetudinibus Normanniæ de propinquitate

heredum: et apud Johannem Serranum in Ludovico Grosso, super controversia Borbonensi. Argentæus *Historia Britannica*, libro vi. c. 4. *In successionibus liberi primogeniti, sive sint masculi aut femellæ, et similiter liberi secundogenitorum, si primogeniti absque liberis ex proprio corpore decesserint, in successione feudorum jure primogenitura repræsentant personas patrum suorum, et veniunt ad talia jura successionum et primogenitura, sicut eorum patres*

the law-books, but that which was received in each nation at the time of the first investiture. For the Goths, Vandals, Huns, Franks, Burgundians, Angles, Saxons, all the Germanic nations which occupied the best parts of the Roman empire, had each their own laws or customs concerning fiefs, as well as the Lombards.

XXII. 1 But there is another succession frequent in kingdoms, called *Lineal*; in this, the rule observed is, not that of the representation of the heir by his progeny, but the heir transmits the future succession, [even if he die before he succeed himself] the law founding a true right upon an expectancy which of itself produces no effect; [see the illustration from the Civil Law;] so that this right passes to his posterity who are descended from the first king: but according to a certain order; so that there are first called in the children of the last possessor of the first degree, both those who are alive and those who are dead: and among those alive and dead account is had, first of sex,

primum, deinde ætatis: Mortuorum autem jus si prævaleat, transeat ad eos qui ab ipsis descendunt, pari rursum inter pares prærogativa sexus, ac deinceps ætatis, salvaque semper transmissione mortuorum in vivos, vivorum in mortuos. Si liberi ejus desint, venit ad alios qui proximi sunt, aut, si viverent, essent, simili transmissione et inter pares in eadem linea observato discrimine sexus et ætatis, ita ut ob sexum et ætatem nunquam transeat de linea in lineam. Cui consequens est ut filia ex filio præferatur filio ex filia, et filia ex fratre filio ex sorore, item filius majoris fratris fratri minori, atque ita in cæteris. Hæc est successio regni Castellæ; ad cujus exemplum etiam majoratus jura in eo regno constituta sunt.

Covarr. t. 2.
Pract. q. c.
38. num. 6.
Molin. de
Prim. Hæsp.
cap. 8.

2 Successionis autem hujus linealis argumentum, si lex et exempla desint, sumi poterit ex ordine qui in publicis cœtibus servatur. Nam si in eo ratio habeatur linearum, id signum erit spem a lege in jus animatam, ita ut a morien-

si viverent, eorum patruos, avunculos excludendo, secundum generalem et notoriam consuetudinem, tam in successionebus per rectam lineam, quam a latere obvenientibus: et de usu et consuetudine ante dicta filia succedit in feudis, sive sint Ducatus, Comitatus, Perrie, aut Baronie, quantumcumque magni et nobiles, et quod ita evenerat in Comitatus Artesii, Campanie, Tolose, et Britannie. Talis ordo succedendi præscriptus

Marchæ Mantuanæ ab Imperatore Sigismundo anno 10000 xxxii. Et a Carolo Quinto Imperatore, et rege Hispaniæ Philippo II. in regnis suis ac principatibus, annis 1010 liv. et 1010 xciv.

■ *In his, quæ ex stipulatione conditionata debentur* Item in legatis, quorum dies cessit, non venit. [Vid. L. v. princ. D. Quando dies Legat. etc.]

then of age: and if the right of the dead be superior, it passes to those who descend from them, with the like prerogative, first of sex, and then of age; and preserving at every step the right of transmission from the dead to the living, and from the living to the dead. If the children of any branch fail, the succession passes to the next who are nearest of kin, or would be if they were alive, by a similar transmission, and observing in those of the same branch the same distinction of sex and age; so that transition is never made, on account of sex or age, from one line to another. It follows from this, that a son's daughter is preferred to a daughter's son, and a brother's son to a sister's son, and an elder brother's son to a younger brother, and so in other cases. This is the succession of the kingdom of Castile: and the same rule holds with regard to *majorats* in that kingdom.

2 An argument for this lineal succession, if law and example be wanting, may be taken from the order of public assemblies; [such as a House of Peers.] For if in such cases also account is had of

tibus in superstites transeat. Hæc autem est successio linealis cognatica, in qua fœminæ et fœminis nati non excluduntur, sed postponuntur in eadem linea, ita ut etiam regressus ad eas sit, si propiores aut pares cetera mares aut ex maribus defecerint. Fundamentum autem hujus successionis, quatenus ab hereditaria differt, est spes populorum de optima educatione eorum, qui spem regni habent justissimam; quales sunt quorum parentes si viverent essent successuri.

XXIII. Est et alia linealis successio agnatica, duntaxat marium ex maribus; quæ ex nobilissimi regni exemplo "successio juris Francici vulgo appellatur. Hæc quatenus a cog-

^a *Successio juris Francici*] Vetus testimonium moris hujus Francici habes apud Agathiam libro II. (Cap. 7). Eadem fuit successio in Davidis stirpe post Solomonem. Vide 2 Paralip. xxiii. 3.

^o *Ubi deficiente agnatica substituitur successio cognatica*] Ut in Provincia Narbonensi. Vide Serranum, *Carolo VII. (de Comitatu Commingensi, pag. 322, 323. Edit. Paris. 1627)*. Ex tali credo lege Theudericho sine liberis defuncto sororis filius Athalaricus successit. [PROCOR. *Gothic. L. I. c. 2.*] Videtur et in Arragonia id olim valuisse.

^p *Possunt et alii successionum modi introduci*] Apud Æthiopes olim regibus succedebant sororum filii, narrante Nicolao Damasceno. (pag. 518. *Excerpt. Petresc.*) Idem apud Pictos usurpatum, semperque successisse cognatos per fœminas notat Beda. Tacitus de Germa-

nis: Sororum filiis apud avunculum idem, qui apud patrem, honor. Quidam sanctiorem arctioremque hunc nexum sanguinis arbitrantur. (Germ. c. 20.) Apud Indos quosdam idem fieri docet nos Osorius, et alii.

^q *Ut qui sibi quoque tempore futuri sunt proximi*] Id in Africa obtinuit ex Gizerichi testamento. Procopius *Vandalicorum* primo: χρόνον δὲ ὀλίγον Γιζέριχος ἐπιβιὼνς ἐτελεύτα, πόρρω που ἤδη ἡλικίας ἦκων, διαθήκας διατιθέμενος, ἐν αἷς ἄλλα τε πολλὰ βανδύλοις ἐπέσκηψε, καὶ τὴν βασιλείαν δὲ βανδύλων εἰς τοῦτον ἵεναι, δεῦν ἐκ γόνου ἄρρενος αὐτῷ Γιζέριχῃ κατὰ γένος προσήκων, πρῶτος ὢν πάντων τῶν αὐτοῦ συγγενῶν τὴν ἡλικίαν τέχου. Aliquanto post tempore Gizerichus obiit, multa jam ætate, facto testamento, quo tum multa alia præceperat Vanda-

lines of descent, that will be a sign that expectancy is by the law vivified into a Right, so that the succession passes from the dead to the survivors.

This is a *Cognatic* lineal succession, in which women and the sons of women are not excluded, but are postponed in their own line; but yet so that there is a regress to them, if there be a failure of claimants nearer, or equal in other things, who are males, or from males.

The foundation of this succession, so far as it differs from the hereditary, is the hope entertained by the people as to the good education of those who have the legitimate hope of the kingdom: and such are they whose parents, if they had lived, would have succeeded.

XXIII. There is also an *Agnatic* lineal succession, of males to males only; which, obtaining in a certain noble kingdom, is called

natica differt in hoc maxime introducta est, ne per fœminarum matrimonia ad peregrinum sanguinem imperium deveniret. In utraque autem lineali successione in infinitum admittuntur etiam qui ab ultimo possessore remotissimo gradu distant, dum a primo rege descendant. Est et ^oubi deficiente agnatica substituitur successio cognatica.

XXIV. ^oPossunt et alii successionum modi introduci, aut populi voluntate, aut etiam ejus qui regnum ita in patrimonio habet, ut alienare possit. Licet enim exempli causa constituere, ^out qui sibi quoque tempore futuri sunt proximi succedant in regnum, sicut apud Numidas olim, puto tali

Liv. xxix. 22.

lis, tum regnum Vandalicum semper venire voluit ad eum qui per lineam masculinam ipsi Gizericho genere proximus, et inter proximos maximus esset ætate. (Cap. vii.) Jornandes: *Gizerichus, diu regnans, ante obitum suorum filiorum agmine accito ordinavit, ne inter ipsos de regni ambitione esset dissensio, sed ordine quisque et gradu suo aliis superveniret, id est seniori suo filio fletet sequens successor, et rursus ei posterior ejus.* (Cap. 33.) Victor Uticensis Lib. II.: *Cui secundum constitutionem Gizerichi regis, eo quod major omnibus esset, regnum inter nepotes potissimum debebatur.* Hic semper spectatur non possessor ultimus, sed primus regni acquisitor: quod succedendi genus ex ipsa Africa sumserit Gizerichus, ubi id valuisse in textu ostendimus, an vero a quibusdam Septentrionis nostri populis, dubitari

potest. Nam et apud Langobardos Vaaci regi filios relinquenti non aliquis filiorum succedere debebat, sed ejusdem generis Rialphus: testis Procopius *Gotthicorum* III. (cap. 35.) Et in Hungariæ regnum mortuo Iatra non liberis ejus sed fratri jus fuisse narrat Nicetas Choniates *de rebus Manuelis* libro IV, (cap. i.) Nescio an eodem pertineat recepta apud Patzinacitas successor, sed obscurius proposita a Constantino Porphyrogenneto *de Administratione Imperii* c. xxxvii. In Dania idem observatum tradit Crantzius *Danicorum* IV. et *Suedicorum* V. Etiam Albæ successit Ænæs non Iulus Ascanio majore filio Ænæs natus, sed alter filius Ænæs Silvius. [Vide Dion. Halicarn. *Antiq. Rom.* Lib. I. c. 70. et Aurel. Victor. *de Orig. Gentis Romanæ* c. 17.]

Frank Law [or *Salic Law*.] This, so far as it differs from the cognatic, was introduced mainly with this view, that the empire might not pass to foreign blood by the marriages of the female branches.

In both these lineal successions, those are admitted who are distant even in the most remote degree from the last possessor, provided they descend from the first king.

There are some cases when, failing the agnatic succession, the cognatic is substituted.

XXIV. Other modes of succession also may be introduced according to the will of the people, or by the will of the patrimonial sovereign. For instance, he may settle that those who on each occasion are nearest to himself, [see Grotius's note] should succeed to the kingdom: as amongst the Numidians formerly, I suppose by some such

Lib. xvi. p.
783.

L. Cum ita
Legat. 38.
§ in Fidei
Commis. 6.
D. de Leg. 2.
Covar. Pract.
quæst. c. 38.
Molin. d. l. c.
6. n. 47.

ex causa, fratres liberis ultimi possessoris præferebantur. Idem in Arabia Felice usurpatum olim fuisse ex Strabone colligo. De Taurica Chersoneso idem recentiores prodidere: nec ita dudum est cum apud Afros Maroci et Fessæ reges idem est factitatum. Atque hoc in dubio observandum in fideicommisso quod familiæ relinquitur, verior est sententia, Romanis quoque legibus congruens, quanquam eas interpretes alio detorquent. His bene cognitis facile erit respondere ad controversias de regnorum jure, quæ ob differentes jurisconsultorum sententias difficillimæ putantur.

XXV. Primum quæritur an filius a patre exheredari possit, ut ne in regnum succedat. In quo distinguenda sunt regna alienabilia, id est, patrimonialia, a non alienabilibus. Nam in alienabilibus dubium non est, quin exhereditatio procedat, cum a bonis aliis nihil differant: atque ideo quæ

* *Apud Afros Maroci et Fessæ reges*] Livius de *Massinissa*: *Militante eo pro Carthaginiensibus in Hispania, pater ejus moritur: (Galba nomen erat:) regnum ad fratrem regis Defalcen (mos ita apud Numidas est) pervenit.* [Idem locus est, qui in contextu indicatur, Lib. xxix. c. 29.] De Mauritania omni vide Marianam libro xxix. (cap. 22.) Hinc sumto exemplo etiam apud Sarcenos, qui ex Africa in Hispaniam venerant, fratres prælati filiis ad tempora Abderamensis; Rodericus Toletanus *Historie Arabum* c. 6. Thuanus *Historiarum* libro LXV. in anno cIo Io LXXVIII.

de Hamete: Quippe patris testamento ad regnum ordine post fratres vocatus, exclusi illorum filii. Idem succedendi genus valuisse et in Mexicano, et in Peruano regno ex historiis illorum locorum observo.

* *Licita erit exhereditatio*] De tali regno intelligendum quod ait Baldus in proœmio decretalium Gregorii, a rege successorem posse eligi e liberis quem velit. Exemplum est etiam in Mexicana historia.

* In omnibus Edd. quæ vivo Auctore prodierunt, hæc legitur: *præmi natus*. Et videtur ita voluisse in casu secundo

rule, the brothers of the last possessor were preferred. So in Arabia Felix, the Tauric Chersonese, and the Africans of Morocco and Fex. And this rule is, in doubtful cases, followed in choosing trustees for family property, as is the sounder opinion, agreeing also with the Roman laws, though the commentators wrest them another way.

These rules being well known, it will be easy to answer the controversies concerning the right of succession, which are thought very difficult in consequence of the different opinions of jurists.

XXV. It is made a question, whether a son can be disinherited by his father so as to be prevented from succeeding to the kingdom. Here we must distinguish alienable, that is, patrimonial kingdoms, from those which are inalienable. In alienable cases, there is no doubt that disinheritance takes its effect, since the kingdom cannot differ from other property; and therefore the rules which by law or custom obtain as to *exheredation* will have place here. And if there are no

legibus aut moribus obtinent de exheredatione, hic quoque habebunt locum: et si nullæ proferantur leges aut mores, tamen naturaliter ¹licita erit exhereditatio usque ad alimenta; aut etiam sine ea exceptione, si crimen morte dignum filius admiserit, aut alioqui graviter peccaverit, et sit unde ali possit. Sic Ruben a Jacobo ob culpam privatus est jure ²primi nati, Adonia regno ³a Davide. Imo etiam pro tacite exheredato habebitur, qui grave crimen commiserit in patrem, ⁴si nulla sunt condonatæ culpæ indicia. Sed in non alienabilibus, quanquam hereditariis, idem non procedet, quia populus viam quidem elegit hereditariam, ⁵sed hereditariam ab intestato. Multo minus procedet exhereditatio in lineali successione, ubi nulla imitatione hereditatis ex dono populi regnum pervenit ad singulos, præscripto ordine.

XXVI. Similis est quæstio, an abdicari possit regnum,

uti substantivo *natus*, obsoleto extracatum sextum. *J. B.*

¹ *A Davide*] Erat enim regnum illud velut patrimoniale Davidi, non quidem belli jure, sed Dei ipsius dono. [At non ob culpam exclusus est regno Adonia. Antequam enim regiam dignitatem adfectasset, jam David pollicitus erat Bathsebæ, matri Solomonis, se hunc successorem suum declaraturum, fidemque datam jurejurando firmarat, 1 Reg. i. 17. quod Deus etiam sibi placere significaverat, 2 Paralip. xxii. 9, 10, 11. Deinde Reges Hebræorum in designando Successore suo liberrime egisse,

et nullam fere ordinis nascendi rationem habuisse, ex tota Historia Sacra adparet. *J. B.*]

² Durum hoc est nimis: et merito ab Interpretibus Auctor noster heic reprehenditur. In dubio potius adfectus paternus mitiorem partem sequi jubet. Legum ex Jure Civili in ora libri indicatarum species plane diversæ sunt, ut in Notis Gallicis fuse ostendimus. *J. B.*

³ *Sed hereditariam ab intestato*] Non testamento: non adoptione. Vide de Neapolitano regno Marianam libro xx.

L. 88. § 11.
D. de Leg. 2.
i. Filio 3.
§ Scio, 11. D.
de Adim. Leg.
Hostien. et
alii in c. Lic.
de Vol.

laws or customs, by Natural Law exheredation is lawful, except as to aliment; and even without that exception, if the son have committed a crime worthy of death, or otherwise greatly offended. Thus Reuben was deprived of his right as first-born by Jacob for his offense, and Adonijah, of the kingdom, by David. And he is held for tacitly disinherited who has committed a grave crime against his father, if there are no tokens of *condonation* or pardon*.

But in inalienable kingdoms, though hereditary, the same does not hold: because the people chose indeed the hereditary way; but the hereditary way with the usual succession to intestates.

Still less will exheredation hold good in a lineal succession, when the kingdom comes to each person by the gift of the people, without attempting to imitate the hereditary rule.

XXVI. Similar is the question whether the kingdom, or the right

* This is rejected by Barbeyrac as too severe.

aut jus succedendi in regnum. Et quin pro se quisque abdicare possit non est dubium: an et pro liberis, magis controversum, sed quod eadem distinctione expediti debet. Nam in hereditariis qui jus a se abdicat, in liberos nihil potest transferre: at in lineali successione patris factum nocere non potest liberis natis, quia simul atque existere cœperunt jus proprium eis quæsitum est ex lege: sed nec nascituris, quia impedire non potest quin ad illos quoque suo tempore jus pertineat ex populi dono. Neque obstat de transmissione quod diximus: est enim ea transmissio necessaria, non voluntaria, ad parentes quod attinet. Illud interest inter natos et nascituros quod nascituris nondum quæsitum sit jus, atque ideo auferri iis possit populi voluntate, si etiam parentes, quorum interest jus ad filios transire, jus illud remiserint: quo pertinent ea quæ de derelictione supra diximus.

XXVII. 1 Solet et hoc quæri, an de successione regni judicare possit, aut rex qui nunc regnat, aut populus per se, aut per iudices datos. ⁶Negandum utrumque est de iudicio

⁶ Populi est omnino iudicium, qui hoc casu, salvo jure successionis, interim quasi sui juris sit, quantum necesse est ad litem dirimendam. Quæ de re plenius egimus in nostris ad hunc locum

Notis Gallicis. Gronovius tamen in Nota sua diffusa, quod alibi haud semel fecisse vidimus, heic etiam mire cavillatur. *J. B.*

^{*} *Causa successionis non subjecta*

of succeeding to it, can be abdicated. And that each person for himself may abdicate, there is no doubt: whether he can do so for his children also, is more controverted, but is to be solved by the same distinction. For in hereditary kingdoms, he who abdicates for himself can transfer nothing to his children. But in a lineal succession, the act of the father cannot be allowed to prejudice sons already born; because as soon as they began to exist, they acquired a right by law; nor sons not yet born, because it cannot prevent that the right should descend to them also by the gift of the people. Nor does the difficulty of transmitting the right make any obstacle: for the transmission is necessary, not voluntary, so far as the parents are concerned. There is this difference between children born, and to be born; that those not yet born have not yet acquired any right, and therefore their rights may be cut off by the will of the people, if the parents whose interest it is that the right should pass to the sons have given up that right: and to this pertains what we have said above of dereliction.

XXVII. 1 This also is made a question, Whether the reigning king, or the people, or judges appointed by them, can judge concerning the succession. And we must deny that they can pronounce a judg-

jurisdictionis. Nam jurisdictio non est nisi apud superiorem, non nuda ratione habita personæ, sed causæ simul, quæ spectanda est cum suis circumstantiis. Est autem ²causa successionis non subjecta regi nunc regnanti: quod inde apparet, quod rex nunc regnans nulla lege obligare potest successorem. Successio enim imperii non est sub jure imperii, ac proinde mansit in statu naturali, quo nulla erat jurisdictio.

2 Attamen si controversi juris sit successio, recte et pie facient qui jus vindicant, si de arbitris inter se conveniant; quod alibi tractabitur. Populus vero omnem a se jurisdictionem in regem et regiam familiam transtulit, nec ea durante ullas ejus habet reliquias. De vero regno loquor, non de principatu. Attamen si de primæva populi voluntate quæstio incidat, ¹non abs re erit populum qui nunc est, quique idem cum eo qui olim fuit censetur, suum super ea re sensum exprimere, qui sequendus erit, nisi satis certo constet olim aliam fuisse populi voluntatem, et ex ea jus quæsitum.

regi] De Galliæ regno vide Thuanum libro cv. anno cLo Io xciii. vide et Guicciardinum.

¹ Non abs re erit populum] Sive in conventu Ordinum, ut factum in Anglia

et Scotia, teste Camdeno in annis cLo Io lxxi. et lxxii. sive per delegatos ad id negotium, ut factum in Arragonia teste Mariana libro xx.

ment as if they had jurisdiction in such a case. For jurisdiction belongs only to a superior, not merely taking account of the person, but of the cause also, which is to be regarded with its circumstances. But the cause of the succession is not subject to the reigning king: which appears from this, that the reigning king cannot bind his successor. For the succession to the sovereignty is not under the authority of the sovereign, and therefore remains in the natural state in which there was no jurisdiction*.

2 If however the right of succession be controverted, they who claim the right, will do rightly and piously if they agree to appoint arbitrators. The people has transferred all the jurisdiction from itself to the king and the royal family; and so long as that lasts, it has no relicks of it. I speak of a true kingdom, not merely of a government. But if a question arise concerning the primeval will of the people, it will be much to the purpose to ask the people now existing, which is conceived to be the same with the former people, to express its opinion upon that matter, which is to be followed, except it appear certainly

* Gronovius argues against this doctrine, but rather in the manner of a rhetorician than a jurist. W.

Paus. iv. 10.

Just. II. 2.
Plut. de
Amor. Frat.
p. 488.
Hottom. III.
q. 2. Tir. de
Primog. q. 31.

Sic Euphaes Rex Messeniis permisit ⁷dispicere quem ex regali Æpytidarum genere regnare oporteret: et de Xerxis et Artabazanis controversia populus cognovit.

XXVIII. Ut ad alia veniamus, filium qui ante regni adeptionem natus est, in regno individuo præferendum ei qui in regia fortuna natus est, in quavis successionis specie verum est. Nam in regno dividuo haud dubie partem feret, ut in bonis ceteris, in quibus nunquam distinguitur quo tempore sint quæsita. Qui autem partem ferret in dividuo, et in individuo ætatis privilegio præfertur: quare et feudum sequitur filium, qui ante primam vestituram natus est. Sed et in lineali successione simul atque regnum quæsitum est, spes aliqua parta est liberis ante natis: nam fac alios postea natos non esse, nemo prius natos excludendos dixerit. In hoc autem genere successionis spes semel parta jus facit, nec ex

⁷ Ita quidem Interpres Pausaniæ: *Regnum populi arbitrio permisit*: sed aliud Græca significant: Εὐφασὶ δὲ οὐκ ὄντων παιδίων, τὸν αἰρεθέντα ὑπὸ τοῦ δήμου καταλείπειν ἔχειν τὴν ἀρχήν. Quum Euphaes nullos haberet liberos, relinquebatur ut ille succederet in imperium, qui a Populo electus futurus esset, id est, eo res omnino deveniebat. Ut proinde innuat Pausanias, Populum usum esse suo jure, neque ex concessione Regis tunc regnantis arbitrium illud nactum esse. Ceterum, ut

heic καταλείπειν, ita λείπειν sumitur apud Polybium, Lib. vi. cap. 54. Eodem sensu est apud Epictetum, *Enchirid.* cap. 73. ἀπολείπεται (cap. 46. *Edit. Meibom.*) J. B.

⁸ *Et Arricam*] Cui nomen factum Artaxerxi Mnemoni. Vide Plutarchum *Artaxerxe*.

⁹ *Inter Ottonem primum et Henricum*] Vide hac de re Sigebertum, et notata ad librum III. Wittikindi. Bajazetes, et Gemes, inter se de Turcico regno certarunt; major natu Bajazetes

that the will of the people formerly was different, and that a right was thence acquired. Thus Euphaes, as king, permitted the Messenians to determine who of the royal family of the Egyptidæ should reign; and in the controversy of Xerxes and Artabazanes the people decided.

XXVIII. To come to other questions; that a son who was born before his father's accession to the kingdom is, in an indivisible kingdom, to be preferred to one born during the enjoyment of power, is true in every form of succession. In a divisible kingdom he will doubtless have his share; as is the case with other property, in which no difference is ever made as to the time when it was acquired. Now he who would take a share in a divisible inheritance, will, in a matter indivisible, be preferred on the ground of age; and thus the fief follows the son who was born before investiture. But in a case of lineal succession also, as soon as the kingdom is acquired, there is some expectancy given to the children born previously; for suppose that none were born afterwards, nobody will say that the former children were to be

post facto cessat, nisi quod ex sexus privilegio suspenditur in cognatica successione. Obtinuit hæc quam diximus sententia in Perside inter Cyrum ^aet Arsicam, in Judæa inter Antipatrum Herodis magni filium et ejus fratres; in Hungaria cum Geissa regnum adiit; et in Germania, non sine armis tamen, ^ainter Ottonem primum et Henricum.

Joseph. Ant.
Jud. xvi. 3.
§ 3. et c. 4.
§ 6.

XXIX. Quod autem Spartæ aliter factum legimus, ex lege propria est ejus populi, quæ ob educationem magis accuratam natos in regno præferebat. Idem accidere poterit ex peculiari lege vestituræ primævæ, si imperium detur in feudum vasallo et ex eo nascituris: quo argumento nixus videtur fuisse Ludovicus adversus Galeatium fratrem in controversia ducatus Mediolanensis. Nam ^bin Perside Xerxes, qui contra fratrem Artabazanem obtinuit regnum, ut Herodotus notat, potentia Atossæ matris magis quam jure valuit. Atque in

at Gemes natus imperanti, prævaluit Bajazetes. Mariana libro xxiv. (cap. xxi.) Constantinus Ducas imperium reliqui filiis, quorum duo privato erant geniti, tertius *πορφυρογέννητος*. Zonaras. (Lib. xviii. cap. 9. *Ed. Reg.*) Vide Corsetum tract. *de Prole Regali* iii. parte, questione 26.

^b In *Perside Xerxes*] Imo et Xerxi socius regni factus Artaxerxes, non autem Darius et Hystaspes, majores, sed ante adeptum imperium geniti. [Vide PETAVIUM, *Doctrina. Tempor.* Lib. x.

c. 25. et *Rationar.* Part. ii. Lib. iii. c. 10.] At forte verum est regnum Persidis pependisse a populi suffragiis, sed intra gentem regiam conclusis. Nam id de Arsacidia, qui Parthi Persis imperavere, tradidit Ammianus libro xxiii. (c. 6. p. 397. *Ed. Vales. Gron.*) et de Persia, qui iisdem Parthis succedere, Zonaras in Justino. [Lib. xiv. cap. 5. ubi id tantum dicit, Cavadem, Persarum Regem, Chosroë filio suo natu minimo destinasse imperium, exclusis filiis natu majoribus.]

excluded. But in this kind of succession, an expectancy once given to any one gives him a right, and does not cease by any subsequent event; except that in a cognatic succession it is suspended by the privilege of sex. The opinion which we are stating obtained in Persia between Cyrus and Arsica; in Judea between Antipater, the son of Herod the Great, and his brothers; in Hungary, when Geissa took the kingdom; and in Germany, though not without recourse to war, between Otho I. and Henry.

XXIX. The fact that a different rule was followed at Sparta, proceeded from a peculiar law of that people, which on account of their education, preferred those that were born in the reign. The same may take place by a peculiar Law of the primitive investiture, if the government be given as a fief to a vassal and his offspring: on which argument Ludovico seems to have relied against Galeazzo his brother, in the controversy respecting the dukedom of Milan. For in Persia, Xerxes who obtained the kingdom against his brother Artabazanes owed his success

eadem Perside cum eadem postea controversia nata esset, ut jam attigimus, inter Artaxerxem Mnemona et Cyrum, Darii et Parisatidis filios, Artaxerxes ut natu major, quanquam in privata fortuna genitus, rex dictus est.

XXX. 1 Non minus agitatum etiam bellis et pugnis singularibus, ^can nepos ex filio priore filio posteriori sit præferendus. Sed hoc in lineali successione difficultatem nullam habet: ibi enim mortui pro vivis habentur in hoc, ut jus in liberos transmittant: quare in tali successione sine ullo ætatis respectu præferetur filius, imo in cognaticis regnis et filia, primo nati: quia nec ætas nec sexus efficiunt, ut deseratur linea. At an hereditariis dividuis concurrent ad partes, nisi in istis regionibus, ubi subitio in locum non observatur, ^dut olim in Germania apud populos plerosque: sero enim nepotes admissi sunt cum filiis ad hereditatem. At in dubio credendum potius est locum esse vicariæ isti successioni, quia natura ei favet, ut supra diximus.

2 Quod si aperte jure civili regionis introducta sit subitio in locum mortui parentis, locum habebit etiam si in aliqua

Hott. III. q. 3.
Tiraq. de
Prim. q. 40.
Molin. de
Prim. lib. 6.

Wittich. Sax.
Hist. II. p. 18.
Molin. de
Prim. lib. 8.

^c *An nepos ex filio priore, filio posteriori sit præferendus*] Vide Choppinum de *Domanio* Lib. II. Thomam Grammaticum *decisione Neapolitana* 1.

Johannem le Crier de *Primogenitura*, qui liber insertus est in *Oceanum juris Marianam* libro XX. (cap. 3) et libro XXVI. Cromerum libro XXX.

to the power of his mother Atossa, rather than to his right, as Herodotus notes. And in the same kingdom of Persia, when afterwards the same controversy arose between Artaxerxes Mnemon and Cyrus, Artaxerxes as the eldest, though born in a private station, was made king.

XXX. 1 It has also been a matter of contest, discussed by means of wars and single combats, whether the grandson of the former son be to take precedence of the later son. This, in a lineal succession, can have no difficulty; for there the dead are held as living, in this respect, that they transmit their right to their children: wherefore in such a succession the son of the first-born is preferred without any regard to age; and in cognatic kingdoms, the daughter also: for neither age nor sex lead them to desert the line. In divisible hereditary kingdoms, the claimants share the inheritance according to the shares of the sons; except in those countries in which the substitution of the son for the parent is observed, as among most peoples in Germany. For it was only at a later period that grandsons were admitted along with sons to the inheritance. But in a doubtful case, we are rather to suppose that that vicarious succession has place, because nature favours it.

2 If the substitution of the son in the place of his deceased

lege proximi fiat mentio. Rationes quæ ex legibus Romanis adferuntur ad hanc rem minus firmæ sunt; quod apparebit leges ipsas insipienti. Sed hæc ratio optima est, quod in materia favorabili dictionum significatio extendenda est ad omnem proprietatem, non vulgarem tantum, sed et artificialem, ita ut sub nomine filiorum comprehendantur adoptivi, et sub nomine mortis mors civilis, quia leges ita loqui consueverunt. Quare merito proximi nomine veniet is quem lex in proximum gradum perducit. In regnis vero hereditariis individuis, ubi substitio in locum exclusa non est, neque semper nepos, neque semper filius secundo genitus-præferuntur, sed ut inter pares, quippe juris effectum quoad gradus adæquatos, potior erit is qui ætate præcedit: nam in ætatis privilegium non succedi in regnis hereditariis supra diximus. Apud Corinthios succedebat ὁ πρεσβύτατος ἀεὶ τῶν ἐκγόνων, ex liberis defuncti regis is qui natu esset maximus, ut ex Diodori Siculi libro sexto exscripsit Georgius Monachus. Sic et apud Vandalos, cauto ut hæres esset qui sanguine proximus et maximus esset natu, *prælatas filius secundus natu major filii

Procop. Bell.
Vand. l. 7, 8.

^d Ut olim in Germania] Vide quæ supra notavimus ad § xi. Ea de causa olim in Palatinatu prælatas Rupertus minor Ruperto alteri venienti ex pri-

mogenito. Vide apud Reinkingium Lib. 1. classe iv. c. xvii. n. 35.

* Prælatas filius secundus natu major filii primi filio] Honoricus Genzo-

parent be plainly introduced by the Civil Law, it will have place, although, in any law, *proximus*, "the nearest relation," be mentioned as the successor. The reasons which are drawn from the Roman Laws to this effect, are insecure; as will appear to any one who examines these laws themselves. But this is the best reason; that in a favourable matter, the signification of words is to be extended to every property, not common only, but artificial also; so that under the name of sons are to be comprehended adoptive sons; and under the name of death, civil death, because the laws have been accustomed so to speak. Therefore he may justly come in the name of *proximus* whom the law has put in the nearest place to the succession. But in hereditary indivisible kingdoms, in which substitution of one person into the place of another is not excluded, we cannot say that either the grandson always, or the second son always, is preferred; but as being equal in claim, by the effect of law in equalizing their degrees of relationship, he is preferable who is the elder; for in hereditary kingdoms, as we have said, the privilege of age is not transferred by succession. At Corinth the eldest of the descendants of the deceased king succeeded. So among the Vandals it was provided that the heir should

Conr. Vicer.
VII. Hen.
VII.

primi filio. Sic in Sicilia Robertus prælatus est Martelli fratris majoris filio, non ea proprie ratione quam excogitavit Bartolus, quod feudum esset Sicilia, sed quod regnum esset hereditarium.

Aymo. III. 62.

3 Exstat similis successionis vetus in Francorum regno exemplum in Guntrano, sed id ex electione potius populi contigit, quæ eo tempore nondum plane desierat. At postquam sine ulla electione linealis agnatica successio introducta est, res caret controversia, ut olim apud Spartanos, ubi ad Heraclidas regno delato similis exstitit successio linealis agnatica. Ideo Areus ex fratre majore Cleonymo natus patruo suo Cleonymo antepositus est. Sed et in cognatica lineali successione præferetur nepos: ut in Anglia 'Joannes Edvardi nepos ex primogenito, ejusdem Edvardi filiis Hemoni et Thomæ: quod et in Castellæ regno lege cautum est.

Plut. Lycury.
p. 40.
Just. III. 2.
Paus. III. 6.

XXXI. Pari distinctione respondendum est ad quæstio-

nis filius Gundemundo. De tali successione vide quæ supra in textu et Notis § xxiv. [Honoricus, sive Honnericus, non autem Henricus, (ut hactenus fuerat in omnibus Edd. mendo Typographico) frater erat junior Genzonis præmortui, non filius: Gundemundus vero, filius Genzonis. Dicendum igitur erat, Honoricum, filium Gizerici natu minorem, prælatum fuisse Gundemundo, fra-

tris natu majoris Genzonis filio: sicque exemplum veritati historice, simul et argumento, congruit. Vide locum Procopii, adcuratius laudatum, quam a Grotio fuerat, et a BODINO, *De Rep. Lib. vi. c. v.* pag. 1145, unde errorem huiusmodi videtur noster. *J. B.*]

'*Joannes Edvardi nepos*'] Vide Seranum (pag. 196). Carolo Sapiente: et Marianam libro XVIII. qui ab Edvardi

be he who was nearest and oldest; and the second son, being older, was preferred to the son of the first son. So in Sicily, Robert was preferred to the son of his elder brother Charles Martel, not exactly for the reason which Bartolus devised, because Sicily was a fief; but because the kingdom was hereditary.

3 We have a similar succession exemplified in the Frank kingdom, in Guntram; but that happened rather by the election of the people, which at that time had not quite fallen into disuse. But since the agnatic lineal succession without any election is introduced, the matter is clear of controversy: as formerly at Sparta, where, when the kingdom passed to the Heraclidæ, there was a similar agnatic lineal succession. And thus Areus was preferred to his uncle Cleonymus. But in the cognatic lineal succession also the grandson is preferred; as in England, Richard* the grandson of Edward III. by his first-born [the Black Prince] was preferred to Edmund and Thomas [and others], sons of the same Edward III.: which also is the rule in the kingdom of Castile.

XXXI. By a like distinction we reply to the question between

* Barbeyrac has corrected Grotius's mistakes in the English royal genealogy.

nem inter fratrem superstitem ultimi regis, et fratris majoris filium: nisi quod sciendum est multis in locis inter liberos successionem in gradum mortui esse receptam, ubi recepta non sit in limite transverso. Sed ubi jus non est manifestum, in partem eam quæ liberos parentibus surrogat, potius inclinandum est, quia eo nos ducit æquitas naturalis, in bonis nempe avitis. Nec obstat quod hoc jus in fratrum filiis *προνόμιον* vocat Justinianus: id enim facit non ratione habita æquitatis naturalis, sed juris antiqui Romanorum. Percurramus alias quæstiones quas profert Emanuel Costa.

Nov. 118 c. 3.

XXXII. Defuncti fratris filium, aut etiam filiam patruo regis præferri ait; recte, non in lineali tantum successione, sed et in hereditaria, in regnis ubi subitio in locum mortui observatur: non item in regnis quæ verbis præcis gradum naturalem spectant: is his enim vincet qui sexu aut ætate erit potior.

L. Tutel. 3.
§ Sed et alig.
D. de Leg
Tutorib.

filiis ne controversiam quidem motam ait. (c. 1.) Idem Mariana cum libro XIV. (cap. 8) egisset de controversia inter Alfonsi filium et nepotem ex filio, a conventu ait pro Sanctio filio pronuntiatum, incertum jure an injuria. [Joannem Auctor noster dixit, pro Richardo, ut vel ex Historicis hæc laudatis manifestum est. Joannes unus fuit e patris Richardi; alter vocabatur Ed-

mundus, non Hemon. Vide POLYDOR. VIRGIL. *Hist. Angl.* Lib. xx. init. et CLARIUS. *CLEBICI Bibl. Select.* Tom. xxvi. pag. 1, et seqq. J. B.]

§ *In partem eam quæ liberos parentibus surrogat, potius inclinandum est*] Vide de Joanne et Arto Serranum in Philippo Augusto. Idem in Britannia Armorica pro lineali successione judicatum narrat in Philippo Valesio et Ca-

the surviving brother of the last king, and the son of his elder brother: except that we must know that in many places succession into the place of a person deceased is received, as among the children, when it is not received in the transverse line. When the law is not manifest, we are rather to incline to that rule which puts children in the place of their parents, because natural equity points that way, that is, in things which have descended from the grandfather. Nor is it any objection that Justinian calls the right existing in the sons of brothers a *privilege*; for that he does, not with reference to Natural Law, but to the old Roman Law.

Let us run over some other questions which Emanuel Costa proposes.

XXXII. He says, that the son of the brother of the deceased, or even his daughter, is to be preferred to their uncle; rightly, not only in a lineal succession, but also in a hereditary one, in kingdoms where substitution in the place of the deceased is observed: but not in kingdoms which in precise words respect the natural degree; for there he will be preferred who is superior in sex or age.

XXXIII. Addit, nepotem ex filio filiæ præferri: recte, ob sexum scilicet: cum hac exceptione, nisi quæstio sit in ea regione, quæ etiam inter liberos gradum solum spectet.

XXXIV. Adjicit, minorem nepotem ex filio præferri nepoti majori ex filia; ^hquod in lineali cognatica successione verum est, in hereditaria non item, nisi lex specialis ostendatur. Nec ratio allegata sufficit, quia pater hujus illius matrem fuerat exclusurus: id enim evenisset ob præstantiam mere personalem quæ non transit.

XXXV. Quod addit verisimilius sibi videri, ut neptis ex filio primogenito filium excludat, in regnis hereditariis recipi non potest, etiam admissa in vicem mortui substitutione: ea enim efficit, ut capax sit successionis: sed inter capaces valere debet sexus privilegium.

XXXVI. Atque ideo ¹in Arragoniæ regno filius sororis filiæ fratris prælatus est.

Illuse. Lib. iv.
Hist. Font.
cap. 19.
Afflict. c. 1.
col. 5. n. 90.
de Nat. Succ.
Aguir. Apot.
n. 82.

rolo VIII. (Pag. 165 et 422. De prioribus autem p. 118).

^h Quod in lineali successione verum est] Idque in Lusitania probat Mariana libro xxvi. Tamen contra id Emanuel ait Imperatori Maximiliano prælatum, gentis studiis. (Cap. xi.) Sic idem libro xii. quod in Castellæ regno

Ferdinandus filius Berengariæ sororis minoris defuncti regis Henrici prælatus est Blancæ, sorori majori ejusdem regis, Gallis odio factum ait, in quam Blanca inuuperat. (Cap. 7.)

¹ In Arragonia regno] Olim ibi creditum ait Mariana, fratrem regis, non filias, debere succedere. Postea vero

XXXIII. He adds, that a grandson through a son is preferred to a daughter; rightly; namely, on account of sex: with this exception, unless the question be in a country which, even among children, regards only the degree [the order, not the sex].

XXXIV. He adds, that a younger grandson by a son, is preferred to an older grandson by a daughter; which is true in a cognatic lineal succession, but not in a hereditary, except a special law be produced. Nor is the alleged reason sufficient, that the father of the first would have excluded the mother of the second; for that would have happened on account of a mere personal preference, which is not transferred.

XXXV. What he adds as probable in his opinion, that the granddaughter by the first-born excludes a younger son, cannot be received in hereditary kingdoms, even if we admit substitution in the place of the deceased: for that does indeed make the granddaughter capable of the succession; but among those capable, the privilege of sex must have its weight.

XXXVI. And therefore in the kingdom of Arragon, the son of a sister is preferred to the daughter of a brother.

XXXVII. Eundemque ad modum in regnis hereditariis postponenda erit filia fratris maximi natu, fratri regis natu minori.

linealem successionem ita placuisse, ut sororis filius iis, qui ex fratre, sed remotiore gradu, veniebant, præferretur: libris xv. 13; xix. 21; xx. 2; et 8. Idem libro xxiv. de Alfonso agens (cap. 18): *Ad Arragonii regni heredi-*

tatem nepotes Ferdinandi filii: ex filia etiam si mascula proles deesset, filiiabus ejusdem præferendos sanxit; additque: Sic sæpe ad regum arbitrium jura regnandi commutantur. Vide eundem Marianam libro xxvii. 3.

XXXVII. In the same manner, in hereditary kingdoms, the younger brother of the king is preferred to the daughter of his elder brother.

CAPUT VIII.

DE ACQUISITIONIBUS, QUÆ VULGO DICUNTUR JURIS GENTIUM.

- | | |
|--|--|
| <p>I. <i>Multa dici juris gentium, quæ, si proprie loquamur, talia non sint.</i></p> <p>II. <i>Pisces et feras stagnis aut vivariis inclusas in dominio esse jure naturali, contra quam jure Romano proditum est.</i></p> <p>III. <i>Feras si aufugerint non desinere eorum esse, qui ceperant, si recte agnoscì possint.</i></p> <p>IV. <i>Possessio an per instrumenta acquiratur, et quomodo.</i></p> <p>V. <i>Ut fere regum sint, non esse contra jus gentium.</i></p> <p>VI. <i>Rerum aliarum hero carentium quomodo acquiratur possessio.</i></p> <p>VII. <i>Thesaurus cui cedat naturaliter: et legum circa hoc varietas.</i></p> <p>VIII. <i>Quæ jure Romano de insulis et alluvionibus sunt prodita, nec naturalia esse, nec juris gentium.</i></p> <p>IX. <i>Naturaliter insulam in flumine et alveum associatum ejus esse, cujus est flumen aut pars fluminis, id est, populi.</i></p> <p>X. <i>Inundatione naturaliter dominium agri non amitti.</i></p> <p>XI. <i>Alluviones quoque in dubio esse populi.</i></p> <p>XII. <i>Sed concessas videri his, quorum agri alium finem quam</i></p> | <p><i>flumen non habent:</i></p> <p>XIII. <i>Idem consentendum de relicta ripa et siccata alvei parte.</i></p> <p>XIV. <i>Quid pro alluvione, quid pro insula habendum.</i></p> <p>XV. <i>Quando vasallis cedant alluviones.</i></p> <p>XVI. <i>Solvuntur argumenta quibus Romani jus suum quasi naturale defendunt.</i></p> <p>XVII. <i>Via naturaliter alluvionem impedit.</i></p> <p>XVIII. <i>Naturale non esse ut partus solum ventrem sequatur.</i></p> <p>XIX. <i>Naturaliter ut confusione, ita specificatione ex materia aliena rem fieri communem:</i></p> <p>XX. <i>Etiam si materia mala fide attractata sit.</i></p> <p>XXI. <i>Naturale non esse ut per prævalentiam res minor potiori cedat: ubi et alii Romanorum jurisprudentium errores notantur.</i></p> <p>XXII. <i>Naturaliter ex plantatione, insitione, ædificatione in alieno communionem nasci.</i></p> <p>XXIII. <i>Possessorem naturaliter fructus suos non facere; impendia imputare posse:</i></p> <p>XXIV. <i>Etiam qui mala fide possidet.</i></p> <p>XXV. <i>Traditionem ad dominii translationem naturaliter non requiri.</i></p> <p>XXVI. <i>Usus hactenus dictorum.</i></p> |
|--|--|
- I. 1 **P**ERDUXIT nos ordo ad acquisitionem quæ fit jure gentium, distincto a jure naturali, quod jus gentium

CHAPTER VIII. *Of acquisitions commonly said to be jure gentium.*

I. 1 The order of our subject has led us to that acquisition which takes place *jure gentium*, as distinct from *jus naturale*, Natural

voluntarium supra diximus. Talis est ea quæ fit belli jure : sed de hac re rectius infra agemus, ubi belli effectus explicabuntur. Romani jurisconsulti ubi de acquirendo rerum dominio agunt, ¹ complures ejus acquirendi recensent modos, quos juris gentium vocant : sed si quis recte advertat, inveniet eos omnes, excepto belli jure, non pertinere ad jus gentium illud de quo agimus : sed aut referendos ad jus naturæ, non quidem merum, sed quod sequatur introductum jam dominium, et legem omnem civilem antecedit, ² aut ad ipsam legem civilem, non solius populi Romani, sed multarum circa nationum : credo quia talis legis sive moris origo a Græcis venerat, quorum instituta, ut Halicarnassensis et alii notant, Italix ac vicini populi sequebantur.

2 Hoc autem non est jus illud gentium proprie dictum ; neque enim pertinet ad mutuam gentium inter se societatem,

¹ Jurisconsulti Romani, ubi de modis illis acquirendi domini agunt, non eodem sensu *Jus Gentium* intelligunt, ac Auctor noster ; sed de ipso *Jure Naturali* agunt, quod recentiores Interpretes *Secundarium* vocant. Res clara est ex toto Titulo et *Institutionum*, et *Digestorum* ; ubi etiam interdum illud vocant diserte *Jus Naturale*. Igitur in eo tantum recte reprehendit Auctor noster priscos Jurisconsultos, quod illi nonnulla, quasi *Juris Naturalis*, tradant, quæ veris *Juris Naturalis* principiis

minime consentanea sunt. *J. B.*

² Aut ad ipsam legem civilem, non solius populi Romani, sed multarum circa nationum] Qualis consensus gentium incertis ex causis, etiam in aliis moribus ad jus nihil facientibus, notatur a Plinio, ut hominem non cremari priusquam genito dente VII. 16 : ut Ionum literis uterentur, VII. 57 : uti tonsoribus, VII. 59 : in horarum observatione, VII. 60 : genibus tribuere quandam religionem, XI. 45 : fulgetra poppyamis adorare, XXVIII. 2.

Law ; which we have above called Instituted *Jus Gentium*. Such are the things done by the Laws of War ; but we shall treat of these hereafter.

The Roman Jurists, when they speak of acquiring the ownership of things, reckon many ways of such acquisition, which they say are *juris gentium* ; but if we duly attend, we shall see that they all, if we except the Laws of War, do not pertain to that *jus gentium* of which we now speak ; but are either to be referred to Natural Law (not mere Natural Law, but that which follows the introduction of ownership, and precedes all Civil Law,) or to the Civil Law, not of the Roman People alone, but of many other nations : I suppose, because the origin of such Law or custom came from the Greeks, whose Institutions, as Dionysius Halicarnassensis and others note, the peoples of Italy and the neighbourhood followed.

2 But this is not the *jus gentium* properly : for that does not pertain to the mutual society of nations amongst themselves, but to the

sed ad cujusque populi tranquillitatem: unde et ab uno populo aliis inconsultis mutari potuit, imo et hoc evenire ut aliis locis atque temporibus longe alius mos communis, ac proinde jus gentium improprie dictum introduceretur: quod et revera factum videmus, ex quo Germanicæ nationes Europam ferme omnem invaserunt. Sicut enim olim jura Græca, ita tunc Germanica instituta passim recepta sunt, et nunc etiam vigent. Primus acquirendi modus qui juris gentium a Romanis dicitur, est occupatio eorum quæ nullius sunt: qui modus haud dubie est naturalis, eo quo dixi sensu, introducto jam dominio, et quamdiu aliud lex nulla constituit. Nam et dominium a lege civili effici potest.

II. Ad hoc caput refertur primum captura ferarum, avium, piscium. Sed hæc omnia quamdiu nullius dicenda sint, quæstione non caret. Nerva filius pisces qui in piscina sunt possideri a nobis ait, non qui in stagno: et feras quæ in vivario sunt inclusæ, non quæ in silvis ²circumseptis vagantur. Atqui pisces non minus stagno privato includuntur quam piscina, et feras non minus coercent silvæ bene circumseptæ

L. Possid. 3.
§ Item Feras.
14. D. de
Acq. Poss.

² At vero in Lib. III. § 14 D. *De adquir. vel amitt. possess.* legendum, *quæ in silvis non circumseptis vagantur*: ut, post Franc. Hotomannum, probat. Clariss. NoODT, Obs. I. II. Ceterum de acquisitione et amissione domini in

Feras vide quæ diximus ad PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. IV. cap. VI. § 5. et seqq. in altera præsertim Editione. J. B.

^b *Quod ob difficillimam persecutionem eas pro derelictis habere credamur*

tranquillity of each people: whence it might be changed by one people without consulting others; and also it might happen that in various places and times, very different usages, and thus, different *jus gentium* improperly so termed, might be introduced: which, we see, happened, in fact, from the time that the Germanic nations invaded almost the whole of Europe. For as the laws of Greece formerly, so now Germanic Institutions are everywhere received, and are still in authority.

The first mode of acquiring ownership which is called by the Romans *jus gentium*, is the occupation of things which belong to no one (*res nullius*): which mode is, doubtless, natural in the sense which I have mentioned; ownership being supposed to be introduced, and as long as the law has made no other appointment. For ownership may also take place by the Civil Law.

II. To this head is referred, first, the capture of wild beasts, birds, fishes. But how long these are *res nullius*, belong to no one, is not without question. Nerva says, that fishes in a pond are ours, fishes in a lake are not; beasts which are in a park are ours, not those which

quam vivaria, quæ Græci vocant *θηριοτροφεία* : nec alio hæc differunt quam quod altera angustior, altera laxior custodia est. Quare nostro seculo rectius contraria opinio prævaluit, ut et feræ silvis privatis, et pisces stagnis inclusi, ut possideri, ita in dominio esse intelligantur.

III. Feras simul atque naturalem libertatem recipiunt, nostras esse desinere aiunt Romani Jurisconsulti: atqui in rebus omnibus aliis a possessione quod incipit dominium, non ideo amissa possessione amittitur; imo jus dat etiam ad repetendam possessionem. Res autem nostras alius a nobis auferat, an ipsæ sese, ut servus fugitivus, non multum refert. Quare verius est non per se amitti dominium, eo quod feræ custodiam evaserint, sed ex probabili conjectura, ^bquod ob difficillimam persecutionem eas pro derelictis habere credamur, præsertim cum internosci quæ nostræ fuerint ab aliis non possint. Sed hæc conjectura per alias conjecturas elidi potest; ut si addita sunt feræ ^c*γυνωρίσματα*, sive ^dcrepundia, qualia scimus habuisse cervos quosdam et accipitres, atque inde agnitos et dominis redditos. ^eRequiritur autem corpo-

L. Quod enim.
3. § 1. *D. de Acq. Rer. Dom.*
L. Pomp. 13. D. de Acq. Poss.

ἢ ἢ Hebræis id dici notavimus supra ad caput iv. § 5.

^c *Γυνωρίσματα*] Donatus ad *Eunuchum* iv. 6, monumenta sunt quæ Græci dicunt *γυνωρίσματα*, seu *σπάργαλα*. (Ad vers. 15.)

^d *Creputidia*] Usurpat hoc sensu hanc vocem apologeticus Apuleius. (Pag. 64. *Ed. Pricæi*.)

^e *Requiritur autem corporalis quædam possessio*] Harmenopolus, Lib. ii. Tit. 1. *μη ἐρέωσσε γὰρ τὸν τρώσαντα*

range in the woods, though surrounded by a fence. But fishes are included in a lake, which is private property, as much as in a pond; and a well-fenced wood shuts in beasts, no less than a park: these things differ only in that one is a narrower, the other a wider custody. And accordingly, in our time, the contrary opinion more rightly prevails: and beasts in private woods, and fishes in private lakes, as they can be possessed, so can they be owned.

III. The Roman jurists say, that when beasts recover their natural liberty they cease to be ours: but in all other things the ownership which begins with possession is not lost when we lose the possession; but, on the contrary, gives a right to recover possession. And it cannot make much difference whether it be a fugitive slave that takes them away, or that they take themselves away. Therefore the sounder opinion is, that the ownership is not lost because the beasts escape from our custody, but that it is lost from the probable conjecture, that we may be supposed to let them go as derelicts, on account of the difficulty of pursuing them; especially as it is impossible to know our beasts from others. But this conjecture may be refuted by

L. Nat. 5. § 1.
D. de Acq.
Rer. Dom.

ralis quædam possessio ad dominium adipiscendum; atque ideo vulnerasse non sufficit, ut recte contra Trebatium placuit. Hinc proverbium: *'Aliis leporem excitasti.* Et Ovidio *Metamorphoseon* quinto aliud est scire ubi sit, aliud reperire.

J. in Laq. 85.
D. de Acq.
Rer. Dom.

IV. Sed ³possessio illa potest acquiri non solis manibus, sed instrumentis, ut decipulis, retibus, laqueis, dum duo adsint: primum, ut ipsa instrumenta sint in nostra potestate, deinde, ut fera ita inclusa sit, ut exire inde nequeat: ad quem modum definienda est quæstio de apro, qui in laqueum inciderit.

Host. et alii
in c. non est
de decim.
Jasoni Cons.
119.

V. Hæc ergo locum habebunt si lex nulla civilis intervenit: valde enim falluntur recentiores Jurisconsulti, qui hæc ita putant naturalia, ut mutari nequeant: sunt enim naturalia non simpliciter, sed pro certo rerum statu, id est, si aliter cautum non sit. Germaniæ autem populi, cum princi-

γινέσθαι δεσπόην τοῦ θηρίου, ἐι μὴ καὶ τοῦτου ἀπαίτηται· non aliter enim dominus fera fit qui vulneravit, nisi et cepit.

'Aliis leporem excitasti] Est apud Petronium. (Cap. 131. Ed. Burm.) Ovidius (*Art. Am.* III. 661):

Et lepus hic aliis exagitatus erit.
Langobardorum jure, qui feram ab alio vulneratam occidit aut reperit, aufert dextrum armum cum septem costis. In reliqua is qui vulneravit jus habet, sed non nisi intra horas xxiv. (Lib. 1. Tit. xxii. Leg. 4, 6.)

³ De universo jure *Occupationis* vide PUFENDORF. *De Jure Nat. et Gent.* Lib. IV. cap. 6. ubi in *Notis*, præcipue alterius Editionis, naturam et effectus ejus accuratius exposuimus. J. B.

⁴ *Sapienter existimant, ab illis rebus incipiendum, quæ sine damno cujusquam tribui possunt]* Sed de vitioso usu hujus juris vide Sarsbieriensem *Politicum*, (Lib. I. c. 4.)

⁴ Procurator ille non erat veterum Regum Ægypti minister, sed Imperatorum Romanorum, ex eo tempore constitutus, quo in formam provinciarum regio

other evidence: as if the beast be *marked*, or have a bell hung to it; as we know that deer and hawks have sometimes had, and thereby have been restored to the owners.

Some corporeal possession is required to make the ownership complete; and therefore it is not enough to have wounded them, as is rightly held, in opposition to Trebatius. Hence the proverb, *You started the hare for him to catch.* And so Ovid.

IV. But a possession which gives ownership may be acquired, not by the hands alone, but by instruments, as traps, snares, nets; on two conditions; first, that the instruments be in our power; next, that the creature be so caught that he cannot escape. And by this rule is to be decided the question of the boar which fell into the snare.

V. This is the rule, if no Civil Law intervene: for jurists are much mistaken who think that it is so decidedly Natural Law that it cannot be changed. It is Natural Law, not simply, but in a certain

pibus ac regibus bona quædam essent assignanda, unde dignitatem suam sustinerent, sapienter existimarunt ab illis rebus incipiendum, quæ sine damno cujusquam tribui possint, cujusmodi sunt res omnes quæ in dominium nullius pervenerunt. Quo jure usos et Ægyptios video. Nam et ibi regum procurator, quem ἰδιον λόγον vocabant, vindicabat res ejus generis. Potuit autem lex etiam ante occupationem harum rerum dominium transferre, cum ad dominium producendum lex sola sufficiat.

Strabo, xvii.

Covar. in c.
Peccat. part. 2.
§ 2.

VI. Quo modo feræ, eodem acquiruntur^b et alia ἀδέσποτα, id est, res hero carentes. Nam et hæ, si naturam solam sequimur, sunt invenientis et occupantis. Sic Acanthos insula deserta adjudicata est Chalcidensibus, qui priores intraverant, non Andriis qui priores jaculum immiserant: quia possessionis initium est corporis ad corpus adjunctio, qualis circa res mobiles maxime fit manibus, circa res soli

Plut. Quest.
Gr. 29.

illa redacta est: Ἄλλοι δ' ἴσθιν ὁ προσ-
αγορευόμενος Ἰδιος λόγος, δε τῶν
ἀδεσπότην, καὶ τῶν εἰς Καίσαρα πίπ-
τειν ὀφειλόντων, ἔξεταστής ἐστι.
STRAB. Geogr. Lib. xvii. Pag. 797.
Ed. Paris. Idemque erat, qui in Pan-
dectis dicitur Procurator Cæsaris vel
Rationalis, ut recte observavit Casau-
bonus; quem vide et Not. in LAMFRID.
Alex. Sever. c. 45, et CAPITOLIN. Max-
imin. duob. c. 14. Fefellit Auctorem
nostrum, quod paullo post apud Strabo-
nem legitur: Ἦσαν δ' οὖν καὶ ἐπὶ τῶν

Βασιλέων αὐταὶ αἱ ἀρχαί. Sed ibi agi-
tur de Magistratibus indigenis, τῶν
δὲ ἐπιχωρίων ἀρχόντων, qui manifesto
secernuntur a Romanis, quos Cæsares
Ægypto imponebant. J. B.

^b Et alia ἀδέσποτα] Balensæ ejectæ
regis sunt in Lusitania. Georgius de
Cabedo, decia. Lusit. Parte II. Dec.
xlviil.

^c Non est insula Acanthos, sed urbs
Macedonia, prope mare, versus sinum
Strymonicum. J. B.

state of things, that is, if it be not otherwise provided. But the peoples of Germany, when they wished to assign to their princes and kings some rights to sustain their dignity, wisely thought that they might best begin with those things which can be given without damage to any one; of which kind are the things which have not yet become the property of any; [and thence they gave them a right to the game]. And this too was what the Egyptians did. For there the king's proctor claimed things of that kind. The law might transfer the ownership of these things even before occupation, since the law alone is sufficient to produce ownership.

VI. Other ἀδέσποτα, ownerless things, are acquired in the same way as game. For these too, if we follow nature alone, belong to him who finds them and takes possession. Thus Acanthos was adjudged to the Chalcideans who entered it first, not to the Andrians who first cast a javelin into it: for the beginning of possession is the contact of

pedibus. Scire ubi res est non est reperire, ut habemus apud Ovidium *Metam.* v.

L. III. de Acq.
Poss.

VII. Inter ἀδελφεία sunt et thesauri, id est, pecuniæ quarum dominus ignoratur: quod autem non apparet pro eo est quasi non sit: quare et thesauri naturaliter fiunt inventoris, id est, ejus, qui loco moverit apprehenderitque. Neque tamen id obstat quo minus ¹legibus aut moribus aliud constitui possit. Plato magistratibus indicium fieri vult, et oraculum consuli: et Apollonius thesaurum quasi Dei beneficium ei adjudicabat qui ipsi optimus videbatur. Apud Hebræos receptum, ²ut domino agri thesaurus cederet, videtur colligi posse ex Christi parabola, ³quæ extat Matthæi xiii. Idemque in Syria juris fuisse colligo ex historia, quæ est apud Philostratum libro VI. cap. xvi. Romanorum Imperatorum leges valde hac in parte variarunt; quod partim constitutiones ostendunt, partim ⁴historiæ ⁵Lampridii, Zonaræ, Cedreni.

Philostr. II.
15, 39.

Cap. 39.

In Nerva.
In Nicephor.

¹ Legibus aut moribus] Byblierum lex, quod non posuisti, ne tollas. Probat id Apollonius apud Philostratum. [Lex non est Byblierum, sed Stagyritarum, referente ÆLIANO, Var. Hist. III. 46. Byblii vero idem habebant in more, IV. 1. p. 302. Ed. Perizon. Locus autem PHILOSTRATI idem est, qui in ora libri indicatur: ubi etiam de casu tantum singulari agitur. J. B.]

² Ut domino agri thesaurus cederet] Id jus etiam Romæ obtinuisse videtur Plauti tempore. Ait enim Callicles

(Trinumm. I. 2, 141):

Qui emisit, ejus esseque ea pecunia?

Deinde (Ibid. v. 2, 22):

Atque cum a me lege populi patrium posceret,

Emtor ædium, thesaurum.

³ Non satis tuto ex illa parabola hoc colligi potest. Vide quæ diximus in PUFENDORF. De Jure Nat. et Gent. Lib. v. cap. III. § 8. Not. 2. J. B.

⁴ Historiæ] Vide Tacitum de thesauris in Africa quos Nero spe devoraverat, Annalium XVI. c. 1. Vide Philo-

body with body, which, with regard to moveables, is mostly performed with our hands, with regard to the soil, with our feet.

VII. Among ownerless things is *treasure trove*, that is, money of which the owner is unknown; for what does not appear is, so far, as if it did not exist. Hence by Natural Law such treasure belongs to the finder, that is, him who took hold of it or took it up. Nor is it an objection, that by laws and customs other rules may be established. Plato directs that the fact shall be reported to the magistrates, and the oracle consulted; and Apollonius adjudged it, as a boon of the gods, to him whom he thought the best man. That among the Hebrews the received rule was that the treasure should go to the owner of the soil, appears to follow from the parable, Matth. xiii. The same was the case in Syria. See Philostratus. The Laws of the Roman Emperors varied much on this point; as appears partly by the constitutions, and partly by the histories of Lampridius, Zonaras and Cedrenus.

Germaniæ populi thesauros, ut et alia ἀθέσποτα addixerunt principi: atque id nunc jus commune est, et quasi gentium. Nam et in Germania, et Gallia, et Anglia, et Hispania, et in Dania id observatur. Quod cur injuriæ accusari non possit satis jam diximus.

Th. 2, 2. 66. 5.
et ibid. Cajet.
Covar. in c.
Peccat. p. 3.
§ 2.

VIII. Veniamus ad fluvialia incrementa, de quibus complura extant jurisconsultorum veterum rescripta, recentiorum etiam integri commentarii. Quæ vero in hoc argumento ab ipsis sunt tradita, ea magnam partem omnia sunt ex instituto quarundam gentium, nequiquam a naturali jure; quamquam ipsi sæpe sua instituta eo nomine venditant. Nam plurimæ eorum definitiones hoc fundamento nituntur, quod et ripæ sint proximos fundos possidentium, et ipsi alvei simul atque a flumine derelicti sunt: cui consequens est, ut et insulæ in flumine natæ sint eorundem. Tum vero in fluminis inundatione distinguunt, ut levis quidem dominium non auferat,

Bart. Tyber.
Bapt.
Aym. de all.
Jur. Con. 1.
III. Jur. Civ.
c. 6.

L. Adeo, 7.
D. de Acq.
Rer. Dom.

stratum, de Vita Attici, (Vit. Sophist. II. 1, 2) quem locum Zonaras transcripsit in Nerva.

■ Lampridii] In Adriano et Severo. [c. 46. sed Vita Hadriani, in qua de hac re agitur, c. 18. est Spartiani, ut omnes norunt.]

■ In Germania] Vide Speculum Saxonicum, c. 35. Constitutiones Sioulas Friderici, Lib. 1. Tit. lviii. et cii. [Nullus est Tit. 103 in eo Lib. 1.] Idem Gotthis mos. Rex Theoderichus apud Cassiodorum IV. 34. Non est cupiditas

eripere quæ nullus se dominus ingemisecat amisisse. Idem VI. 8. Depositiones quoque pecuniæ, quæ longa vetustate competentes dominos amisserunt, inquisitione tua nostris applicentur ærariis, ut quia sua cunctos patimur possidere, aliena nobis debeant libenter offerre: sine damno siquidem inventa perdit, qui propria non amittit.

° Recentiorum etiam integri commentarii] Joannis Boreo, Antonii Marsæ, Joannis Gryphiandri, præter ea quorum nomina sunt in textus margine.

The peoples of Germany gave treasure trove, like other ownerless things, to the prince; and that is now the common law, as a sort of *jus gentium*. For it is observed in Germany, France, England, Spain, and Denmark. And that there is in this no wrong done, we have sufficiently explained.

VIII. Let us now come to the additions made to land by rivers; on which subject there are very many rescripts [opinions on cases] of the old jurists, and of the moderns, whole books. But the rules delivered on this subject by them are, for the most part, instituted rules of certain nations, not Natural Law; although they often give their rules as Natural Laws. For many of their determinations rest on this foundation, that the banks belong to the nearest landowners, and also the bed of the river when deserted by the stream: from which it follows that the islands which make their appearance in the river belong to the same persons. Thus in the inundation of a river they make a

D. l. Adeo, 7.
§ 6. Quod si
l. ergo l. Ali.
38. cod. Tit.

major auferat: sed ita, ut si fluvijs uno recedat impetu, postliminio fundus, qui mersus fuerat, ad dominum redeat; si paulatim, non item: imo proximis possessoribus accedat: quæ omnia lege potuisse introduci, et ^putilitate quadam muniendarum riparum defendi, non nego; naturalia esse, quod ipsi sentire videntur, minime concedo.

Vide supra
hoc Lib. c. 3.
in fin.

De Benef.
vil. 4.

De Offic. l. 7.

p. 325 c.

Germ. 26.

IX. 1 Nam si id quod plerumque est respicimus, ^qprius populi terras occuparunt, nec imperio tantum, sed et dominio, quam in privatos agri describerentur. *Fines*, inquit Seneca, *Atheniensium aut Campanorum vocamus, quos deinde inter se vicini privata terminatione distinguunt.* Sic et Cicero: *Sunt autem privata nulla natura; sed aut veteri occupatione, ut qui quondam in vacua venerunt, aut victoria, ut qui bello potiti sunt; aut lege, pactione, conditione, sorte: ex quo fit, ut ager Arpinas Arpinatum dicatur, Tusculanus Tusculanorum: similisque est privatarum possessionum descriptio.* Dion Prussænsis Rhodiaca: πολλὰ ἔστιν εὐρεῖν, ἃ κοινῇ μὲν ἀπεγράψατο ἡ πόλις, διήρηται δὲ εἰς τοὺς κατὰ μέρος, ὅλως δὲ οὐκ· multa inveniri possunt quæ universim civitas sua censet, in singulos autem dominos partitim divisa sunt. Tacitus de

^p Utilitate quadam muniendarum riparum] Vide locum Cassii apud Aggenum Urbicum (pag. 56, 57. in *Auct. Rei Agrar. Ed. Goës.*) et Boëthium (*De Geometr. Lib. II. Pag. 1231. Edit.*

Opp. Basil. 1546).

^q Prius terras populi occuparent] Vide quæ supra in textu et notis cap. iii. § 19.

¹ Contrarium verius est. Vide quæ

distinction that a small inundation does not take away ownership, a large one does; but so that if the river retires by a single impulse, the ground which was flooded returns to the owner by *postliminium*, [a resumption of the previous condition of property:] if the river recedes gradually, it is not so; but, on the contrary, passes to the nearest land-owners. That all this might be established by law, and defended by the consideration of its being a useful rule for the preservation of the banks, I do not deny: that it is Natural Law, which they seem to think, I by no means concede.

IX. 1 For if we look at the general case, peoples occupied the land, not only as lords, but as owners, before it was assigned to private proprietors*. Seneca, Cicero, Dio Prussænsis, Tacitus, speak of the occupation of land by peoples. [See.] What was thus occupied by peoples, and was not afterwards distributed, is to be considered as belonging to the people; and as in a river which is private property,

* As Barbeyrac says, the contrary is more nearly true. W.

Germanis: Agri pro numero cultorum ab universis per vicos (male vices legitur) occupantur, quos mox inter se secundum dignationem partiuntur. Quamobrem quæ primitus a populo sunt occupata, neque postmodum distributa, ea censenda sunt propria esse populi; ac sicut in privati juris flumine nata insula, aut derelictus alveus privatorum est: ita in publico utrumque est populi, aut ejus, cui populus dedit.

2 Quod autem de alveo diximus, idem et de ripa tenendum est, quæ pars est extrema alvei, id est, quo naturaliter flumen excurrit. Atque ita videmus nunc passim usurpari. In Hollandia et vicinis regionibus, ubi frequentissimæ antiquitus fuerunt hujus generis controversiæ ob depressum solum, magnitudinem amnium, et vicinitatem maris, limum hinc recipientis, illuc revehantis per æstuum vices, semper constitit insulas, quæ vere insulæ essent, esse in patrimonio publico. Nec minus derelictos alveos totos Rheni ac Mosæ, quod sæpius judicatum est: et ratione optima nititur.

3 Nam et ipsi Romani Jurisconsulti concedunt, insulam, *quæ in flumine natat, puta, virgultis sustentata, esse publicam; quia cujus juris sit flumen, ejus esse debeat et insula*

L. 65, § 1. et § ult. de Acq. Rer. Dom. L. 1. § 7. Simil. modo. D. de Flum.

observavimus in PUFENDORF. *De Jure Nat. et Gent.* Lib. iv. cap. 7. § 12. Not. 1. alterius edit. Et confer quæ Auctor ibi dicit de toto isto argumento. *J. B.*
Idem et de ripa tenendum est] Sic

in Gallia obtinet: *Sanction des eaux et forests*, Lib. II. c. 1.

* *Quæ in flumine natat*] Descriptio natantium insularum apud Senecam naturalium III. 25. Plinium majorem

an island which makes its appearance, or a deserted river-bed, is the property of the private person; so in a public river, both of these belong to the people, or to him to whom the people has given them.

2 What we have said of the bed of the river, is true also of the bank, which is only the extreme portion of the bed, that is, where the river naturally stops. And we find that this is now the general usage. In Holland, and the neighbouring countries, where of old these controversies were more frequent on account of the lowness of the land, the magnitude of the rivers, and the neighbourhood of the sea, which receives the mud carried down, and brings it back by the reflux of the tide, it was always settled that islands which were true islands were the public property; and in like manner, the deserted beds of the Rhine and the Meuse; which has often been adjudged, and rests on the soundest reasons.

3 For even the Roman jurists allow that an island which floats in a river, for instance, one resting on roots and branches, is public pro-

in flumine nata. Atqui alvei et fluminis eadem est ratio, non ea tantum ex parte quam Romani Jurisconsulti considerant, quia alveus flumine tegitur, verum alia, quam supra attulimus, quod hæc simul a populo occupata sunt, nec in privatum dominium transierunt: quare nec illud recipimus ut naturale, quod aiunt, si limitati fuerint agri, insulam esse occupantis. Id enim ita demum haberet locum, si flumen ipsum et cum eo alveus populo occupati non essent, sicut in mari nata insula fit occupantis.

L. 1. § Si
Insul. 6. D.
de Flum.

X. 1 Nec magis admittendum est illud de graviore inundatione, si naturalem tantum rationem sequimur. Nam ut maxime summa pars agri in arenam dissolvatur, manet tamen solida pars fundi inferior; et, ut de qualitate aliquid mutet, substantiam non mutat, non magis quam pars agri quæ a lacu hauritur, cujus jus non mutari Romani recte sentiunt. Neque illud naturale est quod aiunt "flumina censitorum vice fungi, et de publico in privatum, de privato in publicum addicere. Melius Ægyptii, de quibus hæc sunt apud Strabonem: ἐδέησε δὲ τῆς ἐν' ἀκριβὲς καὶ κατὰ λεπ-

L. Lacus. 12.
D. de Acq.
Rer. Dom.
L. Vicin. 24.
§ Fin. D. de
Aqua pl. L.
Rutil. Poll.
69. D. de
Cont. Empt.
Geogr. xvii.
p. 787.

Lib. II. c. 95. Macrobius 1. *Saturnalius* 1. 7. Elegans talium in Vadimone lacu insularum descriptio apud Plinium minorem Lib. VIII. c. 20. et Flandricarum in libro lectu digno Chiffetii.

[†] Si flumen ipsum et cum eo alveus a populo occupati non essent] Siculus Flaccus libro *De Conditionibus Agrorum*

(Pag. 18, 19): *In quibusdam regionibus fluminis modus assignationi cessit: in quibusdam autem tantum subsecivis relictus est. Aliis autem exceptus, inscriptumque flumini illi tantum.* De subsecivis vide egregia quæ habet, ut omnia sunt illius, Salmasius *ad Solinum*. [Adde Wilhelmi Goëssii, *Antiquitates*

party; because the party who has a right to the river has a right also to an island produced in the river. But the same reason holds for the bed as for the river: not only in the way in which the Roman jurists take it, because the bed is covered by the river, but for another, which we have mentioned above; that the bed and the river were occupied at the same time by the people, and have not since passed into private ownership. And therefore we do not accept as Natural Law what they say, that if the lands are marked by boundaries, the island belongs to him who takes possession of it. That would be so, only if the river and the bed of the river were not already occupied by the people; as an island which rises in the sea belongs to him who takes possession of it.

X. 1 Nor can we admit that doctrine above stated concerning a very grave inundation, if we only follow natural reason. For mostly, though the surface part of the ground is dissolved into sand, the lower solid part of the soil remains; and though it may in some

τὸν διαιρέσεως, διὰ τὰς συνεχεῖς τῶν ὄρων συγχύσεις, ἃς ὁ Νεῖλος ἀπεργάζεται κατὰ τὰς αὐξήσεις, ἀφαιρῶν καὶ προστιθεὶς, καὶ ἐναλλάττων τὰ σχήματα, καὶ τᾶλλα σημεῖα ἀποκρύπτων, οἷς διακρίνεται τό τε ἀλλότριον καὶ τὸ ἴδιον. ἀνάγκη δὴ ἀναμετρεῖσθαι πάλιν καὶ πάλιν.
Opus fuit exacta et subtili agrorum divisione, eo quod Nilus per incrementa sua addens, minuens, faciemque ac signa immutans, confundat terminos quibus suum atque alienum alibi internoscitur. Ideo et repetenda sæpe fuit dimensio.

2 Ab hac sententia non dissentit quod ipsi Romani auctores tradiderunt, quod nostrum est, nostrum esse non desinere nisi facto nostro, adde, aut lege. Sub factis autem et non facta comprehendere supra diximus, quatenus conjecturam adferunt voluntatis. Quare hoc damus, si gravissima sit inundatio, neque alia signa sint, quæ retinendi dominii animum notent, facile præsumi agrum habitum derelictui; quæ æstimatio sicut naturaliter indefinita est ob varietatem circumstantiarum, et viri boni arbitrio permittenda, ita legibus

L. 2. D. De
Div. Reg.
Jur.

Agrarias, ubi accuratius rem pertractavit. J. B.] De toto hoc argumento fluviorum et fluvialium incrementorum videat, si cui vacat, Rosenthalium *De Jure Feudorum*, cap. v. concl. 23. Sittium *De Regalibus* libro II. cap. 3. Cæpollam *De Servitutibus Rusticorum*

Prædiorum, c. 31.

" *Flumina censitorum vice fungi*
 De agri mensore Cassiodorus: *Mores vastissimi fluminis aliis spatia tollit, aliis jura concedit.* [Var. III. 52. ubi alii legunt, *rura concedit, aut terram.*]

measure change the quality, it does not change the substance, any more than a part of the land from which a lake is drained, the right to which is not changed by such a process, as the Romans rightly decide. Nor is that Natural Law which they say, that the rivers, like the collectors of a land-tax [who have to seize and sell the property of defaulters, *Gron.*] increase private property by public, and public by private. The Egyptians judged better, who made a measurement and division of the land, which was independent of the inundations.

2 There is nothing contrary to this opinion in what the Roman writers have delivered, that what is ours does not cease to be ours except by our own act; add, or by law. But among our acts are included also the things which we do not do, so far as they supply a conjecture of the will. Wherefore we grant this, that if the inundation be very grave, and if there are no other signs which imply an intention of retaining the ownership, the land may easily be presumed to be a derelict; and this estimation, as it is naturally indefinite from the

*L. Si ager.
23. D. Qui.
Mod. Unus.
Amitt.*

civilibus definiri solet. Sic in Hollandia derelictus habetur ager, qui per decem annos mersus fuerit, si non aliqua extent signa continuatæ possessionis: quo in genere receptum apud nos non immerito est, quod Romani rejiciunt, ut, si aliter nequeat, vel piscando retineri possessio censeatur. Sed solebant principes tempus præfigere, intra quod veteres agrorum possessores siccare agros deberent: qui ni id facerent tum monebantur qui in agros jus pignoris habebant, deinde hi qui jurisdictionem aut civilem tantum, aut etiam criminalem: qui si omnes in mora essent, tum eorum jus omne ad principem deferrebat: atque is aut ipse agros siccabat, sui-que patrimonii faciebat, aut aliis siccandos dabat retenta parte.

*L. 4. D. Si
Certi. Pet. L.
30. § 2. D. de
Acq. Rev.
Dom. L. 7.
§ 1. cod. Tit.*

XI. De alluvione, hoc est, de adjectione particularum quæ a nullo vindicari possunt, quia unde veniant nescitur, (alioqui enim naturaliter dominium non mutabunt) certum haberi debet hanc quoque esse populi, si modo populus flumen dominio occupaverit, quod in dubio credendum est; alioqui occupantis.

XII. 1 Sed populus ut aliis, ita et proxima prædia

variety of circumstances, and one of those things which must be left to the judgment of a fair man, so is it often defined by the Civil Law. Thus in Holland land is held to be derelict, if it has been under water for ten years, and there are no signs of continuation of possession: and in this case we reasonably accept a rule which the Romans reject; that if you can do nothing else, you may be supposed to retain possession by fishing over it. So princes were accustomed to appoint a time within which the ancient possessors were bound to free their lands from water: and if they did not do this, warning was given, first to those who had mortgages upon the land, next to those who had jurisdiction, either civil only, or criminal also; and if all these parties were behindhand in doing what the law required, the whole right of the property passed to the prince: and he either drained the lands himself, and added them to his patrimony, or gave them to others to be drained, retaining a part of the profit.

XI. Concerning alluvium, that is, the addition of particles which cannot be claimed by any one, because it is unknown whence they come, (for otherwise the part would not, by Natural Law, change its owner,) it should be considered as certain that this also belongs to the people, if the people have assumed possession of the river as owner, which in a case of doubt is to be supposed; otherwise, the property of him who takes possession of it.

possidentibus jus illud concedere potest, et concessisse haud dubie videtur, si agri illi non alium finem ea ex parte quam naturalem, id est, flumen ipsum habeant. Quare non contemnenda est hac in parte Romanorum diligentia, qui limitatum agrum ab aliis agris distinxerunt, dummodo meminimus, agrum mensura comprehensum hac in re paris juris esse cum limitato. Nam quæ de imperiis supra diximus, cum de eorum occupatione ageremus, eadem et in agris privatis obtinent: sed hoc adhibito discrimine, quod imperia in re dubia credenda sunt esse arcifinia, quia id territorii naturæ maxime convenit: at agri privati magis est ut arcifinii non credantur, sed aut limitati, aut certa mensura terminati, quia hoc privatarum possessionum naturæ est congruentius.

L. 16. D. de
Acq. Rer.
Dom. L. 1.
§ 6. D. de
Flum. Bald.
in c. Si quis
de Mass. § 1.
Si de Jerr.
Feud. Cont.
Fuerit.

2 Neque tamen negamus fieri posse, ut populus agrum assignet eo jure quo ipse occupaverat, id est, ad flumen usque; et si id appareat, jus esse alluvionis: quod in Hollandia ante sæcula aliquot judicatum est de agris ad Mosam et Isalam sitis: quia et in literis mancipationum, et in libris censualibus semper dicti erant ad flumen pertingere. Et tales agri si vendantur, quamvis in lege emtionis mensura

XII. 1 But as the people may concede this right to others, so undoubtedly it may concede it to the possessors of the adjacent lands; and it is supposed to have done so, if those lands have no other boundary on that side than the natural boundary, that is, the river. Wherefore we are not to despise the laborious discussion of this subject by the Romans; in which they have distinguished *limitatum*, land bounded by artificial limits, from other lands; provided we recollect that land *mensuræ comprehensum*, determined by its measured quantity, (see II. iii. xvi.) is governed by the same rule as *limitate* land. For what we said before of ownership, when we spoke of occupation, obtains also with regard to private lands: adding this difference, that lordships (*imperia*) are, in a doubtful case, to be supposed to be *arcifinial*, bounded by natural limits, because that best agrees with the nature of the territory: but private lands are rather supposed not to be naturally bounded, but either limitate, or determined by measure; for this is more congruous to the nature of private possession.

2 We do not deny that it may be that a people assigns land to a private person by the same rule by which it had itself occupied it, that is, up to the river; and if that is the case, the possessor has a right to the alluvium: which, in Holland, was some generations ago adjudged to be the case with the lands between the Meuse and the Yssel, because these, both in the leases and in the records of the land-

L. Julian. 13.
§ 4. Si Tit.
Fund. D. de
Act. Empt. et
Vend.

aliqua nominata fuerit, dum tamen vendantur, non ad mensuram, sed suo corporis nomine, naturam suam et jus alluvionis retinent, quod Romanis quoque legibus proditum est, et passim usurpatur.

XIII. Quod de alluvione diximus, id et de relicta ripa et siccata parte alvei censendum est, ut in non occupatis sint ea occupantis: in fluminibus occupatis, populi: privatorum autem ita demum, si a populo, aut jus populi habente, agrum ad flumen excurrentem, qua talem acceperint.

XIV. Sed cum aliud esse jus dixerimus insulæ, aliud vero alluvionis, frequens hinc controversia oritur, utro nomine censendum sit, quod, cum emineat nonnihil, cum proximis prædiis ita cohæret, ut tamen interjecta planities aquis superfundatur: quod passim apud nos ob locorum inæqualitatem videmus accidere. Mores hic variant. In Gelria prædiis accedit, addita occupatione, id quod plaustro onerato adiri potest: in agro Putteno *id quo pedes gladium exsertum tenens potest pertingere. Maxime naturale est, ut discre-

* *Id quo pedes gladium exsertum tenens potest pertingere*] Ex vetustissimo Germanicarum gentium more. Paulus Warnefredi de Anthari rege Langobardorum: *Usque ad eam* (columnam in

mari) *equo sedens accessit Antharis, eamque de hasta sua cuspe tetigit, dicens: usque hic erant Langobardorum fines.* (Lib. III. cap. 33). Similem historiam habes de lancea, qua in

tax, are always said to reach to the river. And if such lands be sold, although, in the articles of sale, some measure be mentioned, yet since they are sold, not by measure but bodily, they retain their nature and right of alluvium: which is also declared in the Roman Law, and everywhere acted on as usage.

XIII. What we have said of alluvium, is also to be considered to apply to a deserted river-bank and a part of the bed dried up; namely that, in places not occupied, they belong to him who takes possession; in occupied rivers, to the people; and to private persons only if they have received from the people, or from one who derives right from the people, land running on to the river, as such.

XIV. But since we have said that the rule respecting an island is different from the rule for alluvium, a controversy often arises which of the two a piece of ground is, when there is an elevated promontory connected with the nearest land by a plain which is under water: which perpetually happens with us on account of the inequality of the ground. Here usages vary. In Gueldres it becomes part of the land, provided it be occupied and can be visited with a loaded cart: in the land of Putten, as far as a man on foot with a sword in his hand can reach. The most natural rule is, that an island should

tum videatur id qua majori temporis parte navigio transiri solet.

XV. 1 Nec minus trita usu quæstio est inter principem qui jure populi utitur, et ejus vasallos qui imperium summo minus acceperunt. In imperii sola concessione fluvialia incrementa non inesse satis apertum est. Sed notandum est, horum vasallorum nonnullos cum illo definito imperio simul accepisse agrorum universitatem, salvo eo quod privatis competit, puta quod ager is olim populi aut principis fuerit, aut a principe siccatus. Et hoc casu dubium non est, quin vasalli jus habeant quod populi aut principis fuit. Ac sic videmus in Zelandia vasallos, etiam qui de civilibus tantum judices dant, pro tota agrorum universitate tributum pendere: cujus partem a singulis pro privatarum possessionum modo ferunt. Et his de alluvionibus non movetur controversia.

Sunt quibus flumen ipsum datum est, qui proinde insulas sive limo aggestas, sive factas ex alveo, quem amnis circumluit, suas recte dicunt.

mare jacta Otto Imperator fines imperii in freto Baltico designare se dixit, apud Saxonem libro x. et alios. [Hoc tantum dicit SAXO *Grammat. Hæstam, cujus*

usum habebat, maritimos in fluctus, relinquendi monumenti gratia, jaculatus, eum freto vocabulum indidit. Pag. 165. Ed. Weck. 1876.]

be considered as separate from the land when there is a strait through which a ship can commonly pass.

XV. 1 No less frequent is the question between the sovereign prince, and his vassals who have subordinate authority. That the mere concession of sovereignty does not carry with it the increase made by rivers, is plain enough. But it is to be noted that some vassals have received, with their definite authority, the right to the whole land, saving what belongs to private persons; it may be, because the land formerly belonged to the prince or to the people, or was drained by the people. In this case it is not doubtful that the vassals have the same rights which the prince or the people had. And thus we see in Zealand, vassals who have only civil jurisdiction, [not criminal,] still pay the land-taxes for the whole of the land; of which they in return claim a part from private possessors according to their holdings. And in such cases there is no question about the right of alluvium.

In some cases, the river is given to a person, and then of course he rightly claims the islands that are produced, whether arising from accumulated mud, or parts of the bed which the river leaves.

2 There are other persons whose grant does not comprehend either

2 Sunt alii, in quorum investitura nec hoc nec illud comprehensum est, et horum adversus fiscum mala causa est, nisi aut mos regionis illis faveat, aut longi satis serie temporis possessio, accedentibus quæ oportet, jus pepererit.

Quod si non imperium, sed ager in feudum datus sit, videndum quæ sit agri natura, ut supra diximus. Nam is si est arcifinius, alluvio feudo comprehensa censebitur, non ex jure peculiari principis, sed ex agri qualitate: nam et usufructuario tali casu alluvio prodesset.

L. 9. Item of
Fund. § 4.
Huic Vicin.
D. De Univ.

XVI. Solent ⁸Romani, ut jus, quo utuntur ipsi, probent esse naturale, tritum illud pronuntiatum afferre: Secundum naturam est, ut cujusque rei eum sequantur commoda, quem sequuntur incommoda: quare cum amnis de agro meo sæpe partem deterat, æquum esse ut ejus beneficio utar. Sed ea regula locum non habet, nisi ubi ex re nostra commoda existunt: at hic existunt e flumine quod alienum est. Quod autem perit, domino perire, id vero naturale est. Denique non esse universale quod adferunt, ipsa ostendit admissa ab ipsis agrorum limitatorum exceptio: ut jam omittam ita plerumque evenire, ut alios flumen ditet, alios pauperet.

Phars.vl.277. Lucanus :

Illos terra fugit dominos, his rura colonis
Accedunt donante Pado.

⁸ Non ipsi Joti veteres, sed recentiores Interpretes. Nam Romani eo principio nitebantur, quod Alveus pars

Ripæ censeatur. J. B.

[Quod a Romanis] Cum quibus consentit c. 31. Caroli Calvi edicto Pis-

the one or the other of these things: and these have no case against the public; except either the custom of that country favours them, or a long possession, with due circumstances, have generated a right.

But if it be not the authority or lordship, but the land which is granted as a fief, we must see what is the nature of the land, as above stated. If it is *arcifinial*, the alluvium is to be considered as comprehended in the grant, not by the peculiar right of the prince, but by the nature of the land: for a tenant for a term would in such case also enjoy the profits of alluvium.

XVI. The Romans, in order to prove their own Law to be Natural Law, are wont to adduce that trite maxim: It is according to nature that he should have the advantages of anything who has the disadvantages: wherefore, as the river may often carry away a part of my land, it is reasonable that I should take what it gives. But that rule does not hold, except when the advantages come from a thing which is ours; but here they come from the river, which belongs to

XVII. Sed et quod aiunt viam publicam non intercedere alluvioni, rationem naturalem nullam habet; nisi ager privatus sit qui viam debeat.

L. 38. D. de
Adq. Rer.
Dom.

XVIII. Est et acquirendi modus, inter eos qui juris gentium vocantur, per genituram animantium: qua in re quod a Romanis et aliis quibusdam gentibus est statutum, ut partus ventrem sequatur, non est naturale, ut supra diximus, nisi quatenus plerumque pater ignoratur. At si probabili ratione de eo constaret, cur non partus ex parte ad eum pertineat nihil potest afferri. Nam et patris partem esse quod nascitur certum est. Plusne vero de patre, an de matre habeat, inter Physicos disputatur. Plutarchus ea de re sic disserit: ἡ φύσις μίγνυσι διὰ τῶν σωμάτων ἡμᾶς, ἐν ἑκτέρων μέρος λαβοῦσα καὶ συγχέασα, κοινὸν ἀμφοτέροισι ἀποδῶ τὸ γενόμενον· ὥστε μηδέτερον διορίσαι, μηδὲ διακρίναι τὸ ἴδιον, ἢ τὸ ἀλλότριον. *Natura sexuum corpora miscet, ut ita de utroque parte sumta confundat, et commune utrisque reddit quod nascitur, ita ut neuter possit, quid suum sit, quid alienum, discernere.* Et hoc secutæ sunt veteres Francorum et Langobardorum leges.

Conf. Prec.
p. 140.

tensi. De aliorum circa hanc rem legibus vide quæ supra in textu et notis c. v. hujus libri § 29.

² *Commune utrisque reddit*] Vide appositum ad hanc rem locum Galeni 11. de semine, et quæ ibi ex Athenæo.

another party. But that what is destroyed is lost to the owner, is Natural Law. And that what they allege is not universally applicable, appears by the exception, admitted by themselves, of limitate land. The river enriches some, impoverishes others, as Lucan says.

XVII. What they further say, that even a public road [passing along the river-bank] does not bar the right of alluvium, is a doctrine for which there is no natural reason; except the private land be bound to keep up the road.

XVIII. There is another mode of acquisition, amongst those which are reckoned *juris gentium*, by the generation of animals: in which that which has been ruled by the Romans and some other nations, that the offspring follows the mother (as to property) is not Natural Law, as we have said above, (n. v. xxix.) except so far that the father is unknown in most cases. But if there were any probable certainty concerning him, no reason could be assigned why the offspring should not belong partly to him. For that what is born is part of the father is certain. Whether it derive more from the father or the mother is disputed among physiologists. So Plutarch. [See.] And this view was followed in the old laws of the Franks and Lombards.

Lib. III. 6.

XIX. 1 Si ex aliena materia speciem quis fecisset, Sabiniani dominium ejus esse volebant, qui materiæ fuisset dominus; Proculus ejus, qui speciem fecisset, quia per eum esse cœpisset quod ante non existeret: arrepta tandem est media sententia, ut si reverti ad priorem speciem materia posset, materiæ dominus rem haberet; si non posset, tum is haberet qui speciei esset auctor. Quod ipsum improbat Connanus, et hoc unum videri vult, plusne sit pretii in opere an in materia, ut quod pluris est id prævalentia sua quod minus est ad se trahat, argumento eorum quæ a Romanis quoque jurisconsultis de accessione tradita sunt.

2 At si naturalem veritatem respicimus, sicut confusis materiis communionem induci pro rata ejus quod quisque habeat, Romanis quoque jurisconsultis placuit, quia res alium exitum naturaliter reperire non poterat; ita cum res constant materia et specie tanquam suis partibus, si alterius sit materia, alterius species, sequitur naturaliter rem communem fieri pro rata ejus quanti unumquodque est. Species enim

Chrysostomus ad v. Ephesiorum: *μὴ τὰς mixta genitura fetus oritur.* (Verg. *γέντων τῶν σπερμάτων τίκτεται* δ. 31. Tom. III. pag. 865).

XIX. 1 [There is a question concerning property in which materials and labour are mixed.]

If I make a new article of materials belonging to another, the Sabinians* determined it to be the property of him to whom the materials belonged; Proculus, the property of me who gave it the new form, by which the article began to be what it is. But at last the medium opinion was accepted: that if the matter could return to its former shape, the owner of the material should have it; if it could not, then the person who was the author of the new form. But Connanus condemns this, and is for having this point alone considered; whether there be a greater amount of value in the workmanship or in the material; and for directing that that which is the more valuable should prevail, and draw to it that which is of less value; arguing by reference to the doctrines of the Roman jurists concerning value added to a thing.

2 But if we look at Natural Law merely, as the Roman jurists decided that when materials of two kinds belonging to two persons are indistinguishably mixed, there is a common property produced, in proportion to each person's share, because otherwise there could be no natural termination of the question: so when things consist of matter and form as their parts, if the matter belong to one, the form

* The followers of Massurius Sabinus. Gronov.

pars est substantiæ, non substantia tota: quod Ulpianus vidit, cum dixit mutata forma prope intererant substantiam.

L. 9. Julian.
§ 3. Sed si
quis. D. ad
exhib.

XX. Ut autem qui mala fide materiam alienam attrahant, speciem perdant, est quidem non inique constitutum, sed pœnale, atque ideo non naturale. Natura enim pœnas non determinat, nec ob delictum per se dominia aufert, quanquam naturaliter pœna aliqua digni sunt, qui delinquant.

L. 12. de eo
exhib. § 3.
Si quis. D. ad
exhib.

XXI. Ut vero rei majori acquiratur res minor, quo fundamento Connanus nititur, naturale est facti, non juris: atque ideo qui fundi pro vicesima parte est dominus, tam manet dominus quam qui partes habet novendecim. Quare quod de accessione ob prævalentiam aut certis in casibus lex Romana constituit, aut in aliis etiam constitui potest, id naturale non est, sed civile, ad commodius transigenda negotia; natura tamen non repugnante, quia lex dandi dominii jus habet. Vix autem ulla est tractatio juris in qua tot discrepantes sint jurisconsultorum sententiæ et errores. Nam quis concedat, si æs et aurum mixtum fuerit, alterum ab altero

* Nec mirum: quum in toto isto certo et solido niterentur. Vera, et ex jure Accessionis Veteres nullo principio ipsa naturali ratione petita, nobis vide-

to another, it follows by Natural Law that the article is common property, according to the share of value which belongs to each. For the form is part of the substance, but not the whole substance: which Ulpian saw, when he said that by the change of form the substance was almost destroyed.

XX. But that they who with fraudulent intent meddle with matter that belongs to another, lose their right to the form which they have given it, is indeed a rule not otherwise than equitable; but it is a penal Law, and therefore not a Natural Law; for Nature does not determine punishment, nor does she take away ownership for a delinquency *per se*; though by Natural Law delinquents are worthy of some punishment.

XXI. But that the minor thing becomes an appendage to the major thing, which is the ground on which Connanus rests, is a natural rule in fact, but not in law. He who is part-owner of an estate, for a twentieth part only, is as much part-owner as he who has the nineteen parts. Wherefore all that is settled in the Roman Law, or may further be settled, about one part becoming an appendage to the other on account of the prevalence of value, is not Natural Law, but Civil Law, introduced for the convenience of business; nature not repugning, because the law has the right of giving ownership. But there is scarce any part of law in which the opinions and errors of jurists

*L. Idem, 5.
§ 1. D. de Res
Vind.
L. in Rem. 23.
§ Item, 5. D.
eod.
Inst. de Res.
Div. § Lili.
23. et § Si
quis, 34.*

diduci non posse, quod scripsit Ulpianus; aut ferruminatione confusionem fieri, quod Paulus; aut aliam esse scripturæ, aliam picturæ rationem, ut huic tabula cedat, illa tabulæ?

*L. Tit. 60. D.
de Acq. Res.
Dom.*

XXII. Plantata et consita ut solo cedant, similiter est juris constituti, cujus ratio est quod ista solo alantur. Nam ideo et de arbore distinguitur, an radices egerit. Atqui alimentum rei jam ante existentis partem duntaxat facit: atque ideo sicut ex alimento jus quoddam in rem soli domino nascitur; ita domino seminis, plantæ, aut arboris jus suum naturaliter certe ob id non perit. Quare et hic communio locum habebit: nec minus in edificio, cujus partes sunt solum et superficies: nam si mobile sit, nullum in eo jus habebit soli dominus, quod et Scævola placuit.

*L. Sed et si,
25. § Consul.
2. D. de Fel.
Herod.*

XXIII. Bonæ fidei possessor ut fructus omnes ex re suos faciat quos percepit, naturale itidem non est, sed hoc tantum ut jus habeat, impendia in rem facta et operam

mur posuisse, in Notis ad PUFENDORPIUM. *De Jure Nat. et Gent.* Lib. IV. cap. 7. alterius Editionis: præsertim vero ad Compendium *De Officio Hom. et Civis*, Lib. I. cap. 12. § 7. not. 4. tertius et quartus Edd. *J. B.*

* *Imo et existentes, si aliter non fiat et restitutio, retinendi*] Vide hac de re *Speculum Saxonicum*, in quo multæ æquitatis plenissima. II. 48.

¹ Non mihi videtur. Sed de eo diximus in Notis Gallicis ad hunc locum, *J. B.*

are so various. For who will allow that if copper and gold are mixed together they cannot be separated, as Ulpian writes; or that in welding, [*ferruminatione*] there is an indistinguishable mixture, as Paulus; or that the rule is different for a written paper and a picture; the canvas being an appendage to the picture, but the writing to the paper?

XXII. That plantations and crops are appendages to the soil is similarly an established rule of law; of which the reason is, that they are nourished by the soil. On this account a distinction is made in a tree, according to whether it has shot out roots. But aliment makes only a part of a thing already existing: and therefore, as the owner of the soil acquires some right from the aliment supplied, so the owner of the seed, plant, or tree planted, does not thereby lose his right according to Natural Law. Therefore this too will be a case of common property: and in the same way in a house, of which the parts are the ground and the superstructure; for if the building be movable, the owner of the soil has no right in it, as Scævola also decided.

XXIII. That a *bona fide* possessor, [one who believes that he has a right,] acquires a property in all the fruit or income which he draws from the property, is not Natural Law: but only so far as this; that he has a right to charge the expenses which he has bestowed upon the

utilem imputandi, ac pro iis deducendi fructus perceptos; imo et exstantes, si aliter non fiat ei restitutio, retinendi.

XXIV. Atque idem dicendum videtur ¹de malæ fidei possessore, ubi lex pœnalis non intercedit. *Benignius est*, ait Paulus Jurisconsultus, *etiam in prædonis persona haberi rationem impensarum; non enim debet petitor ex aliena jactura lucrum facere.*

L. Plane, 38.
D. de Hered.
Pa.

XXV. Ultimus acquirendi modus qui juris gentium dicitur, est per traditionem. Atqui supra diximus, ad dominii translationem ^bnaturaliter traditionem non requiri; quod et ipsi Jurisconsulti in quibusdam casibus agnoscunt, ut in re donata usufructu retento, aut in eum collata qui possideat, aut commodatam servet, in jactis missilibus: imo etiam ante adeptam possessionem nonnullis casibus nunc quoque transit dominium, ut hereditatis, legatorum, rei donatæ ecclesiis et piis locis, aut civitatibus, aut causa alimentorum, bonorum quorum universalis societas contracta est.

L. Quisq. 28.
C. de Don.
L. 21. § 1. D.
de Acq. Rer.
Dom.
§. 44. L. De
Rer. Div.
L. Cum Her.
23. D. de Acq.
Pos.
L. a Tit. D.
de Furt. 64.
L. ut Int. 33.
C. de SS. Ecc.
L. Si doc. 1.
C. de Don.
quæ sub mod.
L. 1. § 1. et
l. 2. D. pro
Socio.

^b *Naturaliter traditionem non requiri*] Non sane. Vide *legem Wisigothicam* Lib. v. tit. ii. c. 6. *Tum videtur vera esse traditio, quando jam apud illam scriptura donationis habetur. Et apud veteres Romanos res mancipi*

alienabantur plene per æs et libram. Vide Varronem Lib. vi. *de Lingua Latina* (pag. 82): Festum Pompeium in voce *Rodus*: *Ulpianum Institutionum* tit. xix. *Boethium ad Topicæ Ciceronis*. (Lib. iii. pag. 797).

property, and his useful labour, and of deducting them from the income received: and even of retaining the rising crop if repayment is not otherwise made.

XXIV. The same may be said of a possessor *malæ fidei*, [who knows that he has not a right,] when the penal law does not interfere. *It is more considerate*, says Paulus the jurist, *that even in a man who has robbed us we should take account of his expenses; for the complainant ought not to derive gain from another's loss.*

XXV. The last mode of acquisition which is called *juris gentium* is by tradition or delivery. But we have said above that delivery is not required by Natural Law for the transfer of ownership; as indeed the Jurists themselves in some cases acknowledge: as in a thing which is given to another, while the present enjoyment of it is retained by the donor, or which is made over to a person who already holds it, or has it as a loan, or in things thrown among a crowd for them to catch. And in some cases, even now, a man may transfer the ownership before he is owner himself; as [by a certain Roman law,] in inheritances, legacies, things given to churches or pious places, or to communities, or for the sake of aliment, or in cases when a joint property in the goods is established.

XXVI. Hæc ideo annotavimus, ne quis reperta *juris gentium* voce apud Romani *juris* auctores statim id *jus* intelligat quod mutari non possit: sed diligenter distinguat naturalia præcepta ab his quæ pro certo statu sunt naturalia; et jura multis populis seorsim communia, ab his quæ societatis humanæ vinculum continent. Ceterum illud sciendum est, si hoc *jure gentium* improprie dicto, aut unius etiam populi lege introductus sit modus acquirendi, sine discrimine civis et peregrini, jam inde quoque exteris *jus nasci*: et si *juris consecutio* impediatur, injuriam etiam talem quæ justam belli causam præbere possit.

XXVI. We have noted these things, in order that when any one finds the term *juris gentium* in the Roman jurists, he may not, as a matter of course, understand that *jus* which is immutable: but may carefully distinguish precepts of Natural Law from those which, in a certain state, are natural; and rights which are common to many peoples independently, from those which contain the bond of human society, [and therefore are truly *juris gentium*].

But this is to be noted, that if by this *jus gentium* improperly so called, or by the law of one people, a mode of acquiring property be introduced without any distinction of citizen and stranger, this, of course, gives a right to foreigners also: and if the person be prevented from taking possession of the right, there may arise a wrong which gives a just occasion of war.

No ins nature

f VII

Two meanings of the sentence

26

Effect of the program on the students

VIII

Reactions of students

26

5 01 295572 53 004 7 9R 3V 0010

Standard Law Library



3 6105 062 402 008

